STATE OF WISCONSIN

CRIMINAL PENALTIES STUDY COMMITTEE

FINAL REPORT

August 31, 1999

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FORWARD AND ACKNOWLEDGEMENTS

The magnitude of the tasks given this Committee and the short time limits within which to accomplish them have resulted in an extraordinary effort by many highly qualified and capable people. While we relied greatly upon the experience of other states which have preceded us in Truth-in-Sentencing, we believe we have produced a product that is unique to Wisconsin and which will tide the state over the transition from indeterminate to determinate sentencing without bankrupting the treasury. Our work, if adopted by the legislature, should give the sentencing commission which we propose sufficient time to carry out its initial organizational work and begin to undertake the promulgation of permanent sentencing guidelines.

Truth-in-Sentencing was enacted to restore credibility and coherence to criminal sentencing and to deliver a greater measure of public safety to our communities. The impetus behind it was the concern that our present system of parole and other forms of early release had created a "revolving door" criminal justice system, with many offenders serving less than half of their sentences. This contributed to a growing public cynicism regarding the effectiveness of our criminal courts. So, like many other states across the country, Wisconsin enacted Truth-in-Sentencing, abolished parole, and implemented a bifurcated sentencing system in which, beginning at the end of this year, judges will set a determinate prison term for each offender – 100% of which must be served – followed by a term of community supervision, known as extended supervision, the violation of which will subject the offender to a swift return to prison. No longer will authority over sentencing decisionmaking be shared by the judiciary and the parole board. From December 31, 1999 forward, the legislature will continue to specify maximum penalties for crimes, and the judiciary will determine how much of the maximum each offender must serve.

This shift of more complete – and informationally accurate – sentencing decisionmaking to the judiciary places upon judges the task to more carefully fashion a sentence based upon the severity of the crime, the character of the offender, the interests of the community, and the need to protect the public. Judges are on the front lines of the criminal justice system every day, listening to victims and their families, defendants and their families, law enforcement, prosecutors, defense attorneys, and the public. The governor and the legislature recognized some risks in this shift, however: with no parole board and no sentencing guidelines for judges, new determinate sentences might be disproportionate from one offender to the next, or one county to the next. Furthermore, it could be difficult to predict future prison and community corrections needs. Thus, this Committee was created and charged with preparing temporary sentencing guidelines, building the framework for a sentencing commission, and reclassifying our criminal laws.

An issue that has been present throughout our Committee's work is the ever-increasing corrections population. We cannot guarantee that there will not be a continued increase in the number of prisoners in the state prison system, but we are confident that such increases as may occur can, with adequate education of prosecutors, public defenders, judges, and especially the public, be made more gradual, provided that community corrections is greatly strengthened.

There are two critical components to solving the problem of Wisconsin's burgeoning prison population. One is reducing the extent of the social problems in Milwaukee. That County has just 18% of the state's population, but produces 40% of the state's prisoners. Milwaukee's problems are

truly the problems of the state. More attention needs to be given by the state to assisting Milwaukee in reducing drug-related crimes.

In doing that, we cannot overlook the problem of racial disparity in our society. Fifty-eight percent of our state prisoners are members of racial minorities. Three percent of all African-Americans in Wisconsin are now in prison. The comparable figure for whites is .17% -- a shocking difference which compels us to ask "Why has this occurred?" Neither I nor this Committee can answer that question, but if the state wishes to further reduce crime and the prison population it must be willing to undertake a study of that "Why" question and then attempt to ameliorate the causes.

The second critical component is the need to strengthen community corrections. Those states which have succeeded in putting the lid on their prison populations have done so in major part by creating alternatives to prison, often termed “intermediate sanctions.” This approach involves short term incarceration with strict monitoring and supervision once an offender is released from incarceration. Wisconsin's traditional system of probation is not an appropriate disposition option for many criminals who are otherwise not so violent or dangerous that they must be locked up for many years in the prison system. Yet they need some term of lock-up coupled with treatment, usually drug and alcohol, and strict controls when released from incarceration and treatment. Only with such a system in place and working well will judges then consider some form of community supervision for those many defendants who do not now truly fit in prison or traditional probation. Until the perception that community supervision, including probation, is more effective at protecting the public, judges will continue to send defendants to prison who might otherwise be candidates for close community supervision.

There is the danger that our present trend of evergrowing prison population, which has tripled in the last 10 years under our indeterminate sentencing system, could be accelerated by Truth-in-Sentencing because of the attractiveness of extended supervision with its strict supervision system we propose. If community corrections is not strengthened as part of an enhanced probation, and intermediate sanctions with short-term lock-up are not developed and implemented, judges may prefer a prison sentence with a long period of extended supervision over probation. I cannot emphasize more strongly the need to reinvent and enhance probation now, so that the state can have an attractive alternative to prison when judges begin sentencing under Truth-in-Sentencing next year.

These are the conclusions of the chair of this Committee, who has been immersed in these problems the past 13 months.

I am confident that the transition measures we recommend, if adopted by the legislature, will work. That it will, will be due to the devotion to duty and the teamwork of the very capable members of this committee, each of whom has brought a unique talent or insight to our work.

This work has resulted in the reclassification of 484 felonies into nine felony classes with the crimes in each class having a rational relationship with each other and the class preceding. In addition, 101 misdemeanors were reviewed and classified. All this was an arduous and painstaking task.

Our work has resulted also in temporary sentencing guidelines for 11 crimes which implicate approximately three-fourths of the resources the Department of Corrections expends on prisoners. These guidelines are a unique Wisconsin product. If used conscientiously by the sentencing judge, they lead the judge through a reasoned step by step process to an appropriate sentence. This approach combines the "rule of law" approach with the more widely used grid approach. It is the result of hours of agonizing discussion and debate.

First to be acknowledged are our two full-time staff persons Mike Brennan, Committee Counsel, and Jennifer Dubberstein, Research Analyst. Mike brought an incisive mind and a wide range of experience in the criminal and civil law, besides computer knowledge and good writing ability. Jennifer showed a strong ability to analyze raw data, organize it and then present it intelligibly through computer generated charts and graphs.

Each of our committee members devoted many hours of unpaid time to our work. A special commendation must be given to our unpaid Reporter, Professor Tom Hammer of the Marquette Law School. He chaired the Code Reclassification Subcommittee, which had the difficult and painstaking task of bringing rational order to the 585 felonies and Class A misdemeanors now on the statute books. This required extensive research and detailed analytical work on his part, much of which was done on weekends and late at night. Finally, he was responsible for drafting Part II of this report, editing the whole of the report, and reviewing the draft legislation.

Judge Elsa Lamelas of Milwaukee County had the difficult task of chairing the Sentencing Guidelines Subcommittee. This proved to be the most challenging area of our work in which to obtain consensus because of the competing philosophical approaches to sentencing guidelines and the nebulous nature of the subject matter. She ably carried through with grace and patience until near consensus was reached, all the while spending many hours and weekends preparing the details of the guidelines.

Judge Patrick Fiedler of Dane County chaired the Extended Supervision Subcommittee which carefully worked through the complex revocation process, streamlining it and preparing statutory and administrative code changes necessary to do so. He brought his broad experience as a criminal sentencing judge and former secretary of the Department of Corrections.

Professor Walter Dickey of the University of Wisconsin Law School chaired the Computer Modeling Committee. It had the nearly impossible task of coming up with a computer population and cost analysis program in a short time. He brought vast insight in criminal behavior to the committee. He also served on the Sentencing Guidelines Subcommittee. He was ably assisted by Professor Michael Smith, also of the University of Wisconsin Law School, who is a research genius and specialist in criminal sentencing. It was his insights that permitted us to come up with a workable computer cost model. He also sat in for Professor Dickey when he was called to Washington for national committee work.

Judge Diane Sykes of Milwaukee County chaired the Education Subcommittee which made several presentations at judicial and prosecution education seminars. Her committee's work has just begun. In addition, she was a member of the Code Reclassification Subcommittee, to which she brought a deep knowledge of the criminal law and much experience in sentencing some of

Milwaukee's toughest criminals, and the Extended Supervision Revocation Subcommittee. She too has spent much extra time working on this report.

Besides Judge Sykes, several members of our Committee served on more than one subcommittee. These included criminal defense attorney Steve Hurley, who was ever mindful of costs and who was especially helpful in working through the sentencing guideline problem. He served on three committees. Assistant Attorney General Matthew Frank served on the Code Reclassification and Computer Modeling Subcommittees. To each he brought a strong analytical ability and the means to often suggest solutions troubling the subcommittees. Bill Jenkins, a health organization executive, served on two committees. He was our only public member, not having had any relationship with the court system. That proved valuable when he acted to bring the Committee back to earth in its discussions.

Attorney Greg Everts, a civil litigator with Quarles & Brady in Madison and a former prosecutor, ably assisted Judge Lamelas in developing sentencing guidelines. He spent many hours working through the difficult challenge of drafting the guidelines. Greg also was instrumental in working through the Committee's differences on this topic.

Milwaukee County District Attorney E. Michael McCann graphically set forth for the Committee the problems of law enforcement in Milwaukee and its impact upon the state. He also identified the problems of race in the criminal justice system. Assisting in that effort were Linda Pugh of the Milwaukee Women's Center, and Barbara Powell head of the Robert Ellsworth Correctional Center and representative of the DOC.

Judges Michael Malmstadt and Lee Wells, both of Milwaukee County, brought many years of experience on the criminal bench as well and considerable prosecution experience. Each made enormous contributions at critical times.

Sheriff Brad Gehring of Outagamie County was our only law enforcement officer. He proved valuable in giving us considerable insight into how the state's actions affect county jails.

State Public Defender Nicholas Chiarkas called the Committee's attention to a number of effective treatment programs that should be considered by the state when it enhances community corrections. He was ably represented by Mike Tobin, Director of the Trial Division of the State Public Defender, at Code Reclassification Subcommittee meetings as well as full Committee meetings.

This Committee would not have been able to successfully complete its work, if it were not for the critical insights furnished by Senator Joanne Huelsman of Waukesha County. She was our only legislator. She conscientiously attended all meetings, including those of the Code Reclassification Subcommittee, except when she could not because of her legislative duties, and then she sent one of her staff members. She had the knack of being able to suggest problem solving compromises at critical times.

The Committee had the assistance of many Wisconsin public servants, some of whom attended nearly all meetings and provided valuable information and insight. Further, the committee had the full cooperation of the Departments of Corrections and Administration.

Those who deserve special mention include:

Governor Tommy G. Thompson, as well as Stewart Simonson and Mark Grapentine of the Governor's office.

Secretary Mark Bugher, Linda Seemeyer, George Lightbourn, Ed Main, and Patricia Reardon, all of the Department of Administration.

Secretary Mike Sullivan, Secretary Jon Litscher, Bill Grosshans, Shiva Sathisivam, Mark Loder, Rick Geithman, David Albino, and Bob Pultz all of the Department of Corrections.

Jefren Olsen and Mike Dsida of the Legislative Reference Bureau.

Jere Bauer, Jr. of the Legislative Fiscal Bureau.

Former Wisconsin Supreme Court Justice Janine Geske.

The following Wisconsin Circuit Court Judges who, along with judges from the Committee, participated in the June 11, 1999 survey: Dennis Barry, Angela Bartell, Michael Brennan, Ed Brunner, Timothy Dugan, William Foust, William Griesbach, James Mason, Gerald Nichol, Peter Naze, and Gregory Peterson.

Milwaukee County Circuit Judge Jeffrey Kremers, who participated in the judicial survey, helped in the drafting of sentencing guidelines, and attended a number of Committee meetings.

Ed Eberle of Rep. Dean Kaufert's office, formerly of Rep. Scott Walker's office.
Melissa Gilbert of Rep. Scott Walker's office.
Ray Sobocinski of Sen. Joanne Huelsman's office.

David Schwarz and William Lundstrom of the Department of Administration, Division of Hearings and Appeals.

David Becker, Chuck Hoornstra, Donald Latorraca, Lee Pray, and Sally Wellman of the State Attorney General's office.

Jennifer Bias, Therese Dick, James Gleason, Kim Heller-Marotta, Marla Stephens, and William Tyroler of the State Public Defender's office.

Patrick Kenney and Karen Loebel of the Milwaukee County District Attorney's office.

Robert Brick of the Director of State Court's office.

Jean Bosquet and Ken McKelvey of the Circuit Court Automation Project.

Alison Poe & Pete Nelson of the Department of Administration, Bureau of Justice Information Services.

Gwen McCutcheon of Premium Business Services.

Hari Hariharan, Russ Lutz, and Bob Tyllo of Systems Seminar Consultants, Madison, Wisconsin.

Respectfully submitted,

Thomas H. Barland, Chair

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Proposed Legislation

Criminal Penalties Study Committee
Final Report

Executive Summary

Conclusions:

Crimes and Their Penalties

1. The current 6 class classification scheme in Wisconsin (A, B, BC, C, D, and E) does not provide sufficient variety in penalties for Wisconsin's 484 felonies. See pp. 14-16.

2. To consolidate all crimes into a single criminal code would result in unnecessary confusion. See pp. 103-104.

3. The maximum fines in the current penalty structure are too low. See pp. 18-19.

4. Act 283 permits offenders to receive periods of extended supervision ("ES") longer than necessary to supervise an offender properly upon release from prison. See pp. 19-20.

5. Some (though not all) penalty enhancer statutes, which must be pleaded and proved to add extra prison time to a crime's statutory maximum, are better considered as aggravating factors at sentencing, and others are rarely if ever used. See pp. 59-63.

6. Mandatory and presumptive minimum sentences reduce judicial and prosecutorial discretion. See pp. 63-65.

7. There is no benefit to continue to incarcerate certain elderly, unhealthy criminals who prove no risk to the community. See pp. 133-134.

Temporary Advisory Sentencing Guidelines

8. No other state's sentencing guideline system satisfied the Committee as best for Wisconsin. See pp. 105-108.

9. To bridge the transition to Truth-in-Sentencing, the Committee developed sentencing guidelines for those 11 crimes that consume the majority of corrections resources. See p. 114.

10. For those crimes for which there are not sentencing guidelines, a conversion table is necessary to understand the relationship between current indeterminate sentence lengths and Truth-in-Sentencing determinate sentence lengths. See pp. 107-108.

Sentencing Commission

11. Various state departments and agencies do not communicate well regarding corrections and criminal justice issues. Communication on these issues also must be improved between the legislature and the Department of Corrections ("DOC"). See p. 117.

12. A Sentencing Commission is needed to bridge the gaps among various state departments and agencies concerning corrections and criminal justice issues and to act as a research agency on such issues. See pp. 117-118.

Extended Supervision and its Revocation

13. In the "new world" of Truth-in-Sentencing, ES should consist of differing levels of supervision based upon an offender's behavior. See pp. 122-127.

14. A greater panoply of sanctions is necessary for violations of the conditions of ES. See pp. 127-132.

15. There should be a sanction for ES violation which includes incarceration more punitive than an alternative-to-revocation but less punitive than full revocation. See pp. 128-129.

16. The parole and extended supervision revocation process should be shortened. See pp. 129-132.

17. The current revocation system, in which administrative law judges (ALJs) make the revocation decision, works well, as it adjudicates hundreds of cases per year, relieving circuit courts of that burden. See pp. 129-130.

Computer Modeling

18. Wisconsin's law enforcement and corrections computer systems are inadequate tools to use when analyzing criminal justice and corrections policies. The Committee found it difficult to get answers to basic statistical questions. These computer systems are not linked, as they should be, and no offender identifying number exists across these systems. See pp. 135-136.

19. Wisconsin uses an overly simplistic, inaccurate method to forecast its corrections population. See p. 136.

20. A corrections population projection mechanism is necessary to consider the impact of different criminal justice and corrections policies. See p. 135.

21. Using a computer model developed for the Committee, five different scenarios have been developed in which Wisconsin's corrections population and costs are forecasted in 2001, 2005, and 2010. See pp. 142-144.

Education of the Bench, the Bar, and the Public

22. Educating the bench, the bar, and the public about Truth-in-Sentencing is most important to ensure that Truth-in-Sentencing succeeds. See p. 146.

Issues for Further Study

23. Milwaukee judges and prosecutors do not have confidence in the effectiveness of probation and parole supervision. See pp. 150-155.

24. The DOC-Division of Community Corrections has implemented experimental programs in Racine and Dane Counties which could be of use to address this problem. See pp. 151-152.

25. States that have implemented Truth-in-Sentencing imprison violent and dangerous offenders for longer periods of time, but also address their prison overcrowding problems by increasing state funding of probation and parole supervision as well as funding and implementing alternatives-to-incarceration. See pp. 153-154.

Recommendations:

1. The Criminal Penalties Study Committee, its office and staff, should continue to exist until the Sentencing Commission begins its work to complete Wisconsin's transition into Truth-in-Sentencing. It will assist the governor and the legislature in consideration of the proposed legislation. Education of the judiciary, prosecutors, defense lawyers, and the public is a vital part of making Truth-in-Sentencing work. That effort needs to be ongoing from the present until the Sentencing Commission begins to function. Furthermore, by continuing to operate, this Committee can collect and incorporate information from this education effort to improve the Sentencing Commission's work, especially in the area of sentencing guidelines. Morever, the testing of the temporary advisory sentencing guidelines in the education seminars may disclose the need to make further improvement, which can only be done by this Committee. See pp. 8-9.

Crimes and Their Penalties

2. The present system of 6 felony classes should be expanded to 9 classes (A through I). This reduces the large gaps between classes that exist in the current system and allows for more precise and discriminating classification of the

several hundred felonies which occupy the middle and lower ranges of the spectrum. See pp. 14-16.

3. The 484 felonies within the criminal code, outside of the criminal code, and in the drug code, should be classified in the Class A-Class I system as recommended. See pp. 24-99.

4. All felonies in the Wisconsin statutes should remain in their current locations in the statutes, rather than be consolidated into a single criminal code. See pp. 103-104.

5. The new, higher maximum fines in the recommended Class A-Class I system should be adopted. See pp. 18-19.

6. Extended supervision terms should be capped as recommended. See pp. 19-20.

7. The current 19 penalty enhancers, which must be pleaded and proved to add extra prison time to a crime's statutory maximum, should be reduced to five. These five enhancers are the most often used penalty enhancers representing the most serious circumstances which warrant increased prison exposure. The remaining penalty enhancers should be converted to statutory aggravating factors considered at sentencing, or be repealed, as respectively recommended. See pp. 59-63.

8. Statutes mandating minimum and presumptive mandatory sentences should be repealed (except for those contained in operating a vehicle while intoxicated crimes) to give prosecutors and judges maximum discretion in sentence recommendations and decisions and to bring greater uniformity to sentences. See pp. 63-65.

9. A geriatric clause should be enacted which, if strict criteria are met, would allow certain elderly prisoners to seek sentence modification converting the balance of the sentence to extended supervision. See pp. 133-134.

Temporary Advisory Sentencing Guidelines

10. Rather than adopt another state's sentencing guidelines system, the Committee recommends using the Sentencing Guideline Worksheets and Notes it has developed for statewide use for the 11 crimes that consume a majority of the state's corrections resources. See pp. 105-116.

11. The conversion table that the Committee has developed should be used when there is no sentencing guideline for a crime. See pp. 107-108.

Sentencing Commission

12. The new Sentencing Commission should:

    a. monitor sentencing practices to modify sentencing guidelines according to public safety needs and changes in sentencing practices, and compile data regarding anticipated needs;

    b. inform the legislature and other agencies of anticipated needs in corrections;

    c. work with the state legislature's budget office to project the fiscal impact of any proposed new criminal laws;

    d. teach the new sentencing guidelines;

    e. issue statistics publishing what sentences offenders received, on which crimes, both statewide, and by geographic area, which reports should be distributed to all judges. See pp. 117-118.

    f. study minority racial overrepresentation in the criminal justice system. See pp. 154-155.

13. The new Sentencing Commission should have 17 voting members, and 3 ex officio members. A term of service on the Sentencing Commission should be for 3 years, the terms should be staggered, and there should be no limit on the number of terms that a member may serve. See p. 119.

14. The new Sentencing Commission should have a staff of 6 and a budget of approximately $400,000 per annum. See p. 120 & Appendix C.

Extended Supervision and its Revocation

15. The strict supervision model recommended by the Governor's Intensive Sanctions Review Panel should be adopted for the initial stage of extended supervision, and offenders may earn their way into lesser degrees of supervision as a result of good behavior. See pp. 122-127.

16. Sanctions for violations of ES conditions should include: (a) alternatives-to-revocation, (b) a confinement sanction, and (c) revocation. See pp. 127-132.

17. The confinement sanction will involve confinement for a period of time not to exceed 90 days in an ES regional detention facility, if available, or if not available, county jail. Regional ES detention facilities should be constructed to house such offenders. See pp. 128-129.

18. The revocation process should be shortened from an average of 84 days to an average of 71 days. See pp. 129-132.

19. The administrative law judge ("ALJ"), who currently conducts revocation hearings and makes the revocation decision, should continue in that capacity. If the ALJ decides the offender on supervision should be revoked, a circuit judge should determine an appropriate time period for the offender to return to prison. See pp. 129-130.

20. The current writ of certiorari process to challenge a revocation decision should not be altered. See p. 131.

21. Judges should be able to change the conditions of ES. See p. 131.

Computer Modeling

22. The new Sentencing Commission should use and build upon the computer model which this Committee developed to discuss policy and forecast corrections population and costs. See p. 145.

23. Better data collection is critical to accurate forecasting of corrections needs and budget requirements. See p. 155.

24. The Circuit Court Automation Project ("CCAP") should be required to cover criminal case reporting in all 72 counties in Wisconsin. See p. 136.

Education of the Bench, the Bar, and the Public

25. The Committee should continue its planned education efforts throughout the state before and after December 31, 1999, the effective date of Truth-in-Sentencing. See pp. 148-149.

Issues for Further Study

26. The DOC—Division of Community Corrections' Racine and Dane County experiments strengthening probation and parole supervision should be implemented in Milwaukee. See pp. 151-153.

27. Increased corrections resources should be directed toward strengthening probation and parole supervision. See pp. 150-155.

28. Stronger alternatives-to-incarceration should be developed, funded, and implemented to relieve prison overcrowding and to decrease corrections costs. See pp. 153-154.

29. Corrections costs may be controlled in the "new world" of Truth-in-Sentencing through:

    a. education of the bench and the bar such that proper determinate sentences are given;

    b. strengthening probation and parole supervision and creating effective alternatives to prison to reduce the number of offenders sentenced to prison due to a lack of confidence in probation supervision; and

    c. use of sentencing guidelines to funnel cases into their proper sentencing ranges. See p. 155-156.

30. The state should study minority racial overrepresentation in the criminal justice system. See p. 154-155.

31. The state should engage in a substantial recodification of its criminal laws. See pp. 156-157

32. The state should engage in a comprehensive review of its drug policies as they relate to education, prevention, treatment, enforcement, and punishment. In suggesting this study, the Committee does not recommend the legalization of controlled substances. See p. 158.

Summary of Walter J. Dickey's Dissent

The Committee opts for business-as-usual at a critical moment in Wisconsin history. If adopted, its recommendations will take the state on a ten year detour during which we shall not do better than muddle along. The "guidelines" are based on grids created by a handful of judges, who made up the ranges by sentencing "hypotheticals." They are not based on real cases. They are not the product of research. They are ranges of sentences imposed without real facts, real victims, or real offenders, and without advocacy from either prosecution or defense. What judge should take such guidelines seriously, when they also ignore real life disparities in charging and plea-bargaining from one county to the next? Even the most optimistic Committee members doubt the accuracy of the "computer model," and almost no attention is given here to the future cost of corrections and of the recommendations the committee makes. Probation, still the predominant disposition in Wisconsin, is unaltered by these recommendations, though it will continue to be the predominant disposition. With probation grossly under-resourced, it seems cynical to recommend a resource-rich post-confinement program of Extended Supervision (formerly known as parole) for those who are not placed on probation particularly when not a single offender will enter the Extended Supervision program during its first year. Will not judges imprison to get the quality of supervision ES offers, when probation would be preferred if it were as good? What sort of "truth" in sentencing is this? The Committee's failure to attend to the virtually unsupervised condition of those

on probation in many Wisconsin communities today, together with its failure to consider the effects of current drug enforcement practices, will exacerbate the racially disparate pattern of imprisonment in this state, wishful rhetoric notwithstanding. All in all, the report opts for the narrowly expedient, when what Wisconsin needs and desires and what the statute promises is truth.

CRIMINAL PENALTIES STUDY COMMITTEE

FINAL REPORT

Introduction

The Criminal Penalties Study Committee ("Committee") submits this report pursuant to the mandate of 1997 Wisconsin Act 283 ("Act 283").[1] In this law, which applies to offenses committed on and after December 31, 1999, the Wisconsin legislature adopted Truth-in-Sentencing as the sentencing policy of this state and created the Committee to conduct a study and make recommendations for its implementation.

This report details the work of the Committee and includes draft legislation to effectuate its recommendations. It is divided into 8 major parts to which several appendices are attached. Proposed legislation follows the appendices.

In Part I, this report explains what 1997 Act 283, the original Truth-in-Sentencing law, changed and did not change in Wisconsin's criminal sentencing practices. Also described are the Committee's statutory charges, its working structure, and the necessity that it continue to function until the Sentencing Commission begins to function.

Part II is devoted to the classification of crimes. The legislature directed the Committee to devise a uniform crime classification system and to classify all felonies and Class A misdemeanors within that system. In this part of the report the Committee proposes expanding the number of felony classes from six to nine, recommends the placement of nearly 500 felonies in those nine classes, and reviews the classification of over 100 Class A misdemeanors. It also addresses the plethora of issues naturally linked to crime classification, including penalty enhancers, minimum penalties (both mandatory and presumptive), maximum original terms of probation, maximum commitment periods for those found not guilty by reason of mental disease or defect, and many others.

In Part III, the report tackles the difficult choice of a sentencing guideline system. Under Truth-in-Sentencing, all actors in the criminal justice system, especially judges who will be making essentially irrevocable decisions on sentence lengths, will need guidance as to proper sentences. The Committee studied the sentencing guidance systems of several states and the federal system, each of which has implemented Truth-in-Sentencing, as well as the former Wisconsin sentencing guidelines, but did not adopt any of them. The Committee also discussed three sentencing guidance proposals from its own members. The Committee attempted to incorporate certain aspects of each of the proposals. Ultimately, the Committee decided to recommend a two-page worksheet with accompanying notes for 11 crimes which consume approximately three-fourths of those corrections resources devoted to prisoners.

[1] 1997 Wis. Act 283 sec. 454(1)(f).

Part IV details the Committee's recommendations concerning a Sentencing Commission. The Committee envisions a Sentencing Commission as a large, broad-based group that will review sentencing policy for the state. The Commission will act as a link among various state criminal justice agencies, and as a bridge between the legislature and the Department of Corrections, to discuss corrections and criminal justice issues. It will also do research.

Under Truth-in-Sentencing, after offenders complete the prison component of their sentences, they serve periods of community supervision, with conditions set by the sentencing judge and the Department of Corrections, called "extended supervision." Part V of the report relates the Committee's vision for extended supervision, and its proposed procedure for its revocation. It also proposes a new "confinement sanction" less punitive than full revocation, but more punitive than an alternative to revocation, to give the DOC a new tool to address the problem of punishable but not revocable conduct.

Part VI details the Committee's challenge in developing a computer model to forecast corrections population and resource needs. It includes preliminary forecasts of prison population and costs using the model.

The Committee's education plans and efforts are described in Part VII. Educating the bench, the bar, and the public about this new law will be an important part of making Truth-in-Sentencing work.

Finally, in Part VIII, the Committee lists the issues which it recommends for further study by the legislature or its designees.

This report is the product of an 18 person, bipartisan Committee made up of judges, prosecutors, criminal defense lawyers, legislators, academics, corrections and law enforcement officials, and members of the public. These individuals, with only a single dissenting vote, offer these conclusions and recommendations as a package. Many hours were spent discussing how these recommendations interrelate. Conclusions reached in different parts of the report often depend on the approaches taken in other parts. (For example, the proposed sentencing guidelines incorporate changes to penalty enhancers adopted during code reclassification.) We encourage the legislature to consider the Committee's work as did the Committee – as a total package.

PART I

Charges to the Committee and the Committee's Working Structure

A. 1997 Act 283: The Original Truth-in-Sentencing Law

Before proceeding to a description of the Committee's work, it is important to highlight the features of Act 283. As it relates to crimes committed on and after December 31, 1999, Act 283:

- Establishes a truthful system of sentencing (e.g., a 1 year sentence to prison means 1 year in prison).
- Abolishes parole.
- Requires a judge to impose a bifurcated sentence, consisting of a term of confinement followed by a term of extended supervision ("ES") in the community, when sentencing a defendant to prison.
- Expands penalty ranges for Criminal Code felonies to allow for ES as follows:

CLASS	MAXIMUM CONFINEMENT	MAXIMUM ES	MAXIMUM IMPRISONMENT
A			Life
B	40	20	60
BC	20	10	30
C	10	5	15
D	5	5	10
E	2	3	5

- Increases maximum sentence lengths for all non-Criminal Code felonies by 50%, or 1 year, whichever is greater, to allow for a term of ES.
- Mandates that the ES portion of the bifurcated sentence be at least 25% of the length of the confinement term imposed by the judge.
- Authorizes the judge to impose conditions on the ES term.
- Directs that prompt action be taken against those who violate conditions of ES.

- Eliminates intensive sanctions as an option for the confinement portion of a bifurcated sentence.

- Calls for the creation of a Sentencing Commission.

- Establishes the Criminal Penalties Study Committee to make recommendations to the legislature and the governor necessary to implement Truth-in-Sentencing.

It is also important to recognize what Act 283 does *not* change. The new law:

- Does not affect those offenders who commit crimes before December 31, 1999. They will be sentenced under the current law and most will be eligible for parole.

- Does not alter parole revocation procedures for those sentenced under current law.

- Does not affect probation as an option for criminal offenses.[2]

- Does not redefine crimes.

- Does not address fines, surcharges, and assessments.

Certain legislative policies are clear from Act 283. Through this act the state expresses it desire for:

- Truthful sentences (e.g., a 1 year sentence to prison means 1 year in prison).

- Sentencing decisions by judges and not the Parole Commission or the Department of Corrections.

- Stricter supervision of every inmate upon release from prison.

- Prompt action when those on extended supervision violate their terms of supervision.

- A uniform system for classifying all Wisconsin felonies, including those in the Criminal Code, those not in the Criminal Code, and those in the drug code.

[2]Current law remains that probation is not an option for violation of a Class A felony.

It is important to note that at present and until December 31, 1999, Wisconsin operates under an **"indeterminate"** sentencing system. Under such a system, the sentence length imposed by a judge is not necessarily – in fact, almost never is – the sentence served by the offender. Offenders sentenced to prison, other than those sentenced to life and those with a fixed parole eligibility date, serve a minimum of the greater of six months or 25% of the court-imposed sentence before becoming eligible for parole ("parole eligibility date"). The decision to grant discretionary parole (release from prison at any time between the parole eligibility date and the mandatory release date, which is ordinarily 67% of the sentence) is made by the Parole Commission. If discretionary parole is granted, the parolee is placed under supervision of the Department of Corrections ("DOC") for a period not to exceed the court-imposed sentence, less time already served. Offenders who reach their mandatory release date without being paroled are also placed under parole supervision for a period not to exceed the court-imposed sentence.[3]

For offenses committed on and after December 31, 1999, a **"determinate"** sentencing system will be used. In the new system, courts will impose a bifurcated (two-part) sentence, consisting of a term of confinement in prison followed by a term of extended supervision in the community. The offender must serve the entire length of the bifurcated sentence ordered by the judge – including the entire term of confinement -- and is not eligible for parole.[4]

The 18-member Criminal Penalties Study Committee was created and charged with making recommendations concerning six topics:

1. Creation of a uniform classification system for all felonies, including felonies outside of the criminal code.

2. Classification of each felony and Class A misdemeanor in a manner that places crimes of similar severity into the same classification.

3. Consolidation of all felonies into a single criminal code.

4. Creation of a sentencing commission to promulgate advisory sentencing guidelines for use by judges when imposing a bifurcated sentence.

5. Development of temporary advisory sentencing guidelines for use by judges when imposing a bifurcated sentence.

[3] See Legislative Fiscal Bureau Informational Paper # 55 pp. 2-4. The Committee notes that under current law mandatory release is only presumptive for certain serious offenses.
[4] Id. at pp. 4-7.

6. Changing the administrative rules of the Department of Corrections to ensure that a person who violates a condition of ES is returned to prison promptly and for an appropriate period of time. [5]

Originally, this Committee was required to submit its report and recommendations to the legislature in the manner provided under Wis. Stat. sec. 13.172(2), and to the governor, no later than April 30, 1999. The report was to include any proposed legislation that is necessary to implement the recommendations made by the Committee in its report.

The Committee found the original deadline unrealistic in light of the magnitude of the tasks assigned to it. There were a total of 585 crimes to be reclassified: 264 felonies within the criminal code; 220 felonies outside the criminal code; and 101 Class A misdemeanors. Temporary sentencing guidelines took considerable time to develop; indeed, the former Wisconsin Sentencing Commission had taken more than five years to develop guidelines for 16 crimes. Further, it took other states between two and five years to do what this Committee was asked to do in nine months, with a much smaller staff. Moreover, the Committee had great difficulty in securing adequate and reliable data from the Department of Corrections and the Circuit Court Automation Project ("CCAP"). Finally, predicting the effect of changes to criminal classifications and sentencing guidelines was extremely complex. It took until late June 1999 to develop a satisfactory working computer model to predict the future number of prisoners, probationers, parolees, offenders on extended and the cost of incarceration and extended supervision.

For all of these reasons, the Committee requested a deadline extension from April 30 to August 31, 1999. This request became Assembly Bill 200. On March 16, 1999, AB 200 passed the Assembly by a vote of 89 to 8. On May 27, 1999, AB 200 was recommended for approval by the Joint Finance Committee by a vote of 16 to 0. The Senate has not yet considered AB 200.

B. The Committee's Working Structure

To fulfill its statutory charges, the Committee was subdivided into five subcommittees:

Code Reclassification
Sentencing Guidelines
Extended Supervision Revocation
Computer Modeling
Education

[5] A synopsis of 1997 Act 283 may be found at Wisconsin Legislative Council Information Memorandum 98-11, and Wisconsin Legislative Fiscal Bureau Informational Paper # 55, "Felony Sentencing and Probation," pp. 4-8

Some Committee members served on more than one subcommittee.[6]

The purpose of the subcommittee structure was to efficiently complete the Committee's work. The first three subcommittees were formed to do the work identified in the six legislative charges. The **Code Reclassification Subcommittee** worked on creating a new classification system and arraying within that scheme crimes from the criminal code, the drug code, and crimes outside of the criminal code. The **Sentencing Guidelines Subcommittee** developed temporary advisory guidelines for the crimes that consume the most corrections resources, and recommended the format for a sentencing commission. The **Extended Supervision Revocation Subcommittee** studied the revocation process, and recommended how it can be improved and streamlined.

The last two subcommittees were formed to address challenges which arose during the Committee's work. The **Computer Modeling Subcommittee** worked to develop computer software to accurately forecast the impact of certain policies on prison population and cost. The **Education Subcommittee** has presented and will be presenting programs to government leaders, judges, the bar, and the public about Truth-in-Sentencing and this Committee's report and recommendations.

At the second full Committee meeting on October 2, 1998, it was agreed that the subcommittees would do the initial work on each charge, and forward their recommendations to the full Committee for review and consideration. The full Committee would either approve the subcommittee's work or direct the subcommittee to continue its work given the full Committee's reactions. This process continued throughout the Committee's one-year existence.

The full Committee met 19 times, including three 2-day meetings. Full committee meeting time totaled approximately 115 hours. The full Committee always met in person, usually in Madison, Wisconsin at the State Capitol.[7] Each full Committee meeting was transcribed, and minutes of each meeting were prepared and distributed to the Committee members and any other interested persons.[8]

The subcommittees met individually, some more than others, depending on the scope of their task. At least 40 subcommittee meetings were held, often in person, but sometimes via videoconference or telephone conference.

Each full Committee and subcommittee meeting was properly noticed pursuant to the open meetings law (Wis. Stat. ch. 19). An opportunity for public comment was provided for at each meeting. The Committee heard from some members of the public

[6] A list of all Committee members by appointing authority, as well as information on subcommittee membership, is found at Appendix A.
[7] A list of the full Committee meeting dates and places can be found at Appendix B.
[8] The transcripts of the Committee's meetings and copies of the committee's minutes are available for review in the Committee's offices at 819 N. 6th St., Rm. 834, Milwaukee, WI 53202, and will be transmitted to the State Historical Society.

concerning its legislative charges, including law enforcement officials, representatives of the public defender's office, and victim's rights representatives.

The Committee employed one full-time attorney and one program and planning analyst. Employees from all areas of state government, including the Governor's office, the Legislative Reference and Fiscal Bureaus, individual legislators and their staffs, the Department of Administration, especially its Division of Hearings and Appeals, the Department of Corrections, especially its Bureau of Technology Management, the State Public Defender's Office, and the Department of Justice helped the Committee complete its work. Numerous outside consultants, paid for by the Committee as well as by federal grants, also helped the Committee complete its work. Without the help of these individuals, the Committee could not have fulfilled its statutory charges.

In the first stages of the Committee's work, it heard from representatives from other states about their experience in implementing Truth-in-Sentencing, including Minnesota, North Carolina, Virginia, Delaware, and Ohio.[9] These presentations educated Committee members on the ways other states had implemented their versions of Truth-in-Sentencing. These reports took place at the Committee's October and November 1998 meetings. In December 1998, the Committee heard special presentations concerning Wisconsin's drug code. In January 1999, the Committee received information on probation and parole revocation procedures, and in July 1999 on strengthening community corrections and on extended supervision.

At Committee meetings from February through July 1999, subcommittees reported on their work to the full Committee for review and consideration by Committee members. The Committee's conclusions are summarized in the foregoing Executive Summary and explained in detail in the pages that follow.

In the year that the Committee met, it had to make hundreds of decisions, some of great magnitude. Hundreds of hours of full Committee and subcommittee meetings, and thousands of person-hours, were spent studying, discussing, and making these decisions. This report represents a composite of those numerous decisions. Although individual members of the Committee may disagree with individual decisions in this report, the Committee agreed by a vote of 17-1 to support the entire package.

C. The Future of the Committee

For a variety of reasons, the Committee recommends that its office and staff remain in operation and fully funded until the new Sentencing Commission begins its work.

The education of the judiciary, prosecutors, defense lawyers, and the public is a vital part of making Truth-in-Sentencing work. That effort needs to be ongoing from the present until the Sentencing Commission begins to function. Because of the education

[9] The vast majority of the cost and expenses associated with these visits were paid for through a federal technical assistance grant.

efforts the Committee must undertake before Truth-in-Sentencing becomes effective December 31, 1999, educational materials, including sentencing exercises, must be produced to be used to teach the new law. Also, Microsoft Powerpoint presentations, in various lengths, should be produced for use at these seminars.

It is also important that the Committee's office remain open to: (1) collect and incorporate information gleaned from this training effort which could improve the Sentencing Commission's work, especially the sentencing guidelines, and (2) reimburse Committee members and staff for expenses incurred in relation to this education effort.

PART II

THE CLASSIFICATION OF CRIMES

Statutory charges:

"*a. Creation of a uniform classification system for all felonies, including felonies outside of the criminal code.*

b. Classification of each felony and Class A misdemeanor in a manner that places crimes of similar severity into the same classification.

c. Consolidation of all felonies into a single criminal code." [10]

A. The History of Crime Classification in Wisconsin

1. 1977 Penalty Classification Legislation

The State of Wisconsin first undertook the process of uniform crime classification more than twenty years ago.[11] In legislation passed in 1977 and which took effect on June 1, 1978, crimes and forfeiture offenses codified in the Wisconsin Criminal Code were placed in one of several uniform penalty classes.[12] Offenses codified elsewhere in the Statutes were not affected by the law.[13]

The 1977 law created five classes of felonies, three classes of misdemeanors, and four classes of forfeitures. The penalty structure for felony and misdemeanor classes was as follows:[14]

[10] See 1997 Wis. Act 283 sec. 454 (1)(e)1-3.
[11] See 1977 Wis. Laws 173.
[12] The 1977 legislation classified all Criminal Code offenses with the exception of abortion (Wis. Stat. sec. 940.04) and removal of shopping cart (Wis. Stat. sec. 943.55). The latter was a new forfeiture offense that had been enacted earlier in the 1977 legislative session. Both of these offenses remain unclassified to this day.
[13] To this day, Wisconsin Statutes employs a classified crime system for Criminal Code felonies and misdemeanors and a non-classified system for the scores of crimes codified elsewhere in the Statutes.
[14] See Wis. Stat. secs. 939.50 to 939.52 (1977).

CLASS	MAXIMUM TERM OF IMPRISONMENT	MAXIMUM AMOUNT OF FINE
Class A Felony	Life	---
Class B Felony	20 years	---
Class C Felony	10 years	$ 10,000
Class D Felony	5 years	$ 10,000
Class E Felony	2 years	$ 10,000
Class A Misd.	9 months	$ 10,000
Class B Misd.	90 days	$ 1,000
Class C Misd.	30 days	$ 500

The Legislative Council Notes to the 1977 penalty classification bill[15] articulate the organizing principles used to place crimes and forfeitures into the new penalty classes. Critical to the placement process was the degree of actual or potential harm involved in the commission of crime:

> Persons guilty of crimes resulting in death or serious physical harm to others are subject to heavy punishments. Other offenses involving less serious harm to persons have generally been considered more serious than crimes against property alone. However, given an equal degree of physical harm to persons, crimes involving actual or potential harm to both persons and property are punished more severely than offenses resulting in harm only to persons. Also, crimes involving actual or potential harm to a number of people or to the general public have been considered more serious than other offenses with a similar degree of harm but more limited in scope or application.[16]

2. Attributes of Classified Crimes

When the attributes of the 1977 crime classification system are analyzed, several features of that system may be observed:

- In each class provision is made for a maximum period of imprisonment.
- Except for Class A and Class B felonies, provision is made in each class for a maximum fine.
- Except for Class A felonies, there are no mandatory penalties.

[15] S.B. 14 (1977).
[16] S.B. 14 at 4-5 (1977).

- There are no minimum penalties (presumptive or otherwise).[17]

- Except for Class A felonies, probation is an option for all felonies and misdemeanors.

An examination of the 1977 Criminal Code further reveals that, when the legislature enacted the penalty classification bill, there were no Chapter 939 penalty enhancers except for habitual criminality.[18] Aggravating circumstances attending the commission of any crime were matters argued by the prosecutor and considered by the court when imposing sentences within the statutory maximum for the crime of conviction.

As it turns out, the classification system recommended by the Committee has many of the same attributes as the 1977 classification system. The latter was simple and straightforward, consistent in its approach across the spectrum of Criminal Code offenses, and capable of ready application by judges and lawyers. The legislature classified offenses on a principled basis according to severity, established penalties for each of the classes with sufficient room at the top for the most serious cases, and recognized that probation could (depending upon the case) be an appropriate disposition in all felony classes except Class A. Further, with the exception of the mandatory imprisonment requirement for Class A felonies, the legislature provided judges with the flexibility to fully use their discretion in deciding the appropriate sentence in each and every case. For the many reasons articulated in the discussion which follows, the Committee recommends a classification and penalty system which, though more elaborate than the five-class system adopted in 1977, draws on the many virtues of that system and has many of its same features.

3. Impact of Subsequent Legislation on the 1977 Crime Classification System

The Criminal Code today looks very different from that which was classified in 1977. In the twenty-plus years since Wisconsin first undertook the process of classification, a surge of criminal law legislation has been enacted which has greatly increased the number of crimes placed into the relatively few classes of felonies and misdemeanors. While it is true that a new felony class was added to the original five (Class BC), it has been used to classify but five offenses.

Beyond the exponential growth in the number of crimes, the Criminal Code today looks very different from that into which crime classification was introduced in 1977 on a number of additional fronts. Wisconsin has participated in the national trend of enacting

[17] The 1977 legislation specifically ridded the Criminal Code of minimum penalties. See, e. g., Wis. Stat. sec. 940.02 (1975) (penalty expressed as imprisonment for not less than five nor more than 25 years).
[18] Wis. Stat. sec. 939.62 (1977). Concealing identity existed but was codified at Wis. Stat. sec. 946.62 (1977) and classified as a crime.

numerous penalty enhancers which increase the maximum punishment for the underlying crime. Add to that the introduction (or in some cases reintroduction) of provisions for minimum mandatory penalties, presumptive minimum penalties, "three strikes," "two strikes," penalty doublers, mandatory consecutive sentences, parole eligibility determinations made by the court, lifetime supervision of certain sex offenders, etc., and the conclusion is inescapable that the world of penalties today is vastly different and enormously more complex than that envisioned when crime classification first came to Wisconsin. It is in this context that the legislature enacted Act 283 and gave to the Criminal Penalties Study Committee the task of bringing some uniformity to the process of crime classification and the penalty structures that attach to the various classifications.

B. Act 283 Mandates for Crime Classification

Among the charges given to the Criminal Penalties Study Committee by the Wisconsin legislature are the following:

- Creating a uniform classification system for all felonies, including felonies outside of the criminal code.[19]

- Classifying each felony and Class A misdemeanor in a manner that places crimes of similar severity into the same classification.[20]

In the text which follows the Committee responds to these legislative mandates. First, it proposes a whole new system for classifying felony offenses. Next it describes the method used to convert almost 600 crimes to the new system. Finally, it proposes a specific crime classification for each of these offenses.

With regard to misdemeanor offenses, the limitations of Act 283's mandates should be noted. The legislature directed the Committee to study the penalties "for all felonies and Class A misdemeanors."[21] Further, it charged the committee to classify "each felony and Class A misdemeanor in a manner that places crimes of similar severity into the same classification."[22] However, it did not speak to the classification of misdemeanors that are presently unclassified. The latter, which constitute a large number of offenses, are scattered throughout the Wisconsin Statutes other than in the Criminal Code.

Given the magnitude of its other duties and a challenging time frame within which to conclude them, the Committee did not venture beyond its charge to explore the classification of unclassified misdemeanors. This means that even if all of the Committee's recommendations regarding the classification of crimes are implemented, there will still be a considerable number of offenses (non-Criminal Code misdemeanors) that will remain unclassified. Classifying them may be a worthy endeavor for the future so that all Wisconsin crimes (wherever codified in the Statutes) are classified in a uniform system of crime classification.

C. Proposal for a New Felony Classification System

1. The Need for a New Classification System

As the Committee undertook the process of classifying nearly 500 felony offenses, it quickly became clear that current law does not have enough felony classes. There are only six felony categories (A, B, BC, C, D and E) and, as a practical matter, the

[19] 1997 Wis. Act 283 sec. 454(1)(e)1.
[20] 1997 Wis. Act 283 sec. 454(1)(e)2.
[21] 1997 Wis. Act 283 sec. 454(1)(e).
[22] 1997 Wis. Act 283 sec. 454(1)(e)2.

vast majority of Criminal Code felonies are classified in only four of them (B, C, D and E). Given the number of crimes that must be placed in these few classes, the result is that a given category will have felonies classified within it which address considerably different kinds of behavior causing (or potentially causing) considerably different harms. For example, the present Class C category (10 years or $10,000 or both) contains robbery, burglary and forgery.

Another problem with the present classification system is that the penalty differences among them are too great. As a result of various changes enacted since the original penalty classification system was adopted in 1977, the structure of felony classes (before treatment by 1997 Act 283) now appears as follows:

CLASS	MAXIMUM TERM OF IMPRISONMENT	MAXIMUM AMOUNT OF FINE
Class A Felony	Life	---
Class B Felony	40 years	---
Class BC Felony	20 years	$ 10,000
Class C Felony	10 years	$ 10,000
Class D Felony	5 years	$ 10,000
Class E Felony	2 years	$ 10,000

While it may appear that this system has a nicely graduated approach to felony penalties, some of its infirmities become clear when the allocation of offenses to each category are examined. Under current law only five felonies are assigned to Class BC. As a practical matter this means that for purposes of classifying mid-level and more serious felonies (not including those for which life imprisonment is the penalty), there is a 30-year gap between the maximum for Class C and that for Class B.

The five-year gap between Class D and C may not seem unreasonable in the current world of indeterminate sentencing; however, as the move is made to the determinate approach of Truth-in-Sentencing, this gap too is considerable. The classification system needs more categories in order to fill these gaps and allow the legislature's charge to "place crimes of similar severity into the same classification"[23] to be fulfilled.

Finally, given the legislature's charge to classify the more than 200 felonies which are codified other than in the Criminal Code, the need for more classifications becomes even starker. For example, drug delivery and possession with intent to deliver are penalized according to the amount of the drug delivered or possessed. The legislature has created numerous amount categories and assigned specific penalties for each. To classify these numerous graduated offenses in a uniform classification system requires more felony classes than are available under present law. Beyond drug offenses are the

[23] 1997 Wis. Act 283 sec. 454(1)(e)2.

more than 150 miscellaneous felonies scattered throughout the Statutes. Most of these are less serious felonies but the need to distinguish severity among them requires more felony categories on the lower end of the classification system.

For all of these reasons, the Committee recommends that the present system of six felony classes be expanded to nine classes. This allows for closure of the large gaps that exist in present law. It also allows for the more precise and discriminating classification of the several hundred felonies that occupy the middle and lower ranges of the spectrum. The chart that follows presents the proposed penalties for each class.

2. Proposed Penalty Structure:

THE A-I FELONY CLASSIFICATION SYSTEM

In the terminology of 1997 Act 283, the maximum term of confinement plus the maximum period of extended supervision equals the maximum period of time that a person could be imprisoned on a sentence.

FELONY CLASS	MAXIMUM TERM OF CONFINEMENT	MAXIMUM EXTENDED SUPERVISION	MAXIMUM TERM OF IMPRISONMENT	MAXIMUM FINE
A	Life		Life	---
B	40 years	20 years	60 years	---
C	25 years	15 years	40 years	$100,000
D	15 years	10 years	25 years	$100,000
E	10 years	5 years	15 years	$50,000
F	7.5 years	5 years	12.5 years	$25,000
G	5 years	5 years	10 years	$25,000
H	3 years	3 years	6 years	$10,000
I	18 mos.	2 years	3.5 years	$10,000

3. Observations About the New A-I Classification System

a. Terms of Confinement. Whenever a court sentences a person to prison for a felony committed on or after December 31, 1999, it must (except in the case of a life imprisonment felony or one involving application of the persistent repeater law[24]) bifurcate the sentence, specifying both a term of confinement and a term of extended supervision. In the system proposed by the Committee, the maximum terms of confinement are graduated rather evenly through the spectrum of felony offenses. With the exception of Class A felonies, there is no minimum period of confinement in any category. This means that in the exercise of judicial discretion probation is an option in Classes B through I. However, if the court sentences the defendant to prison, the minimum period of confinement is one year.[25]

b. Fines. When the Wisconsin legislature classified Criminal Code felonies and misdemeanors in 1977, it provided for $10,000 maximum fines for felonies in Class C, D and E and for misdemeanors in Class A. No fines were established for felonies in Class A and B. When the new BC felony class was added years later, the same maximum fine was made applicable to it as well. The $10,000 maximum has never been adjusted.

The Committee recommends that maximum fines in the A-I classification system be established in the following amounts:

Class A felony	No provision for a fine
Class B felony	No provision for a fine
Class C felony	$100,000 maximum fine
Class D felony	$100,000 maximum fine
Class E felony	$50,000 maximum fine
Class F felony	$25,000 maximum fine
Class G felony	$25,000 maximum fine
Class H felony	$10,000 maximum fine
Class I felony	$10,000 maximum fine
Class A misdemeanor	$10,000 maximum fine

The Committee acknowledges that fines play no role in the disposition of most felony cases. However, it believes that the schedule depicted above should be implemented for several reasons. First, it acknowledges the differing severity of the crimes in the various felony categories. Second, it reflects the changing value of money over time. Third, it addresses concerns that a $10,000 fine for certain more serious crimes is simply not enough for certain offenders, for example, corporations convicted of reckless or negligent homicide (of which there have been several). Finally, it recognizes

[24] Wis. Stat. sec. 939.63(2m) (not to be confused with regular repeater law).
[25] Wis. Stat. sec. 973.01(2)(b).

that with the classification of drug offenses, it is necessary to have sufficient fine exposure for higher-end offenses.

Certain felonies codified outside the Criminal Code have much higher fines than those in the proposed schedule. In specific instances ,the Committee has recommended that those higher fines be maintained.[26]

c. Extended Supervision. The Committee recommends that statutory caps be placed on the maximum amount of extended supervision time the judge may impose at sentencing as follows:

Class A felony	---[27]
Class B felony	20 years
Class C felony	15 years
Class D felony	10 years
Class E felony	5 years
Class F felony	5 years
Class G felony	5 years
Class H felony	3 years
Class I felony	2 years

The Committee believes that a fair reading of Act 283 would in some instances allow for much longer periods of extended supervision. Class B felonies are a useful example. Under Act 283 the maximum possible imprisonment for these felonies is 60 years in prison, but not more than 40 years of initial confinement.[28] While at first blush this appears to leave 20 years for extended supervision, the act does not limit extended supervision to 20 years. Thus, theoretically, a court could sentence an offender to one year in prison followed by 59 years of extended supervision.

This possibility may not have been intended; yet Act 283 seemingly permits it. The Committee suggests that limits be placed on extended supervision which allow for sufficient supervision given the nature of the crimes proposed for inclusion in each of the felony classes while advancing the public safety and offender rehabilitation goals that underlie the notion of supervision upon release from prison. The Committee believes these purposes of extended supervision can realistically be accomplished within the proposed limits without consuming the resources of supervision so far into the future that no one knows what they will even be.

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[26] See, e.g., Wis. Stats. secs. 132.20(2), 133.03(1), & 133.03(2).

[27] When a court sentences a person for a Class A felony, it must make an extended supervision eligibility date determination. See 1997 Wis. Act 283 sec. 424. However, no such determination will be made for persons sentenced under the persistent repeater law (Wis. Stat. sec. 939.62(2m)) because they are not eligible for extended supervision. See 1997 Wis. Act 283 sec. 427.

[28] See 1997 Wis. Act 283 secs. 322 and 419.

The extended supervision caps suggested above would apply regardless of whether the penalties for the crime of conviction have been increased because the actor is a habitual criminal[29] and/or because one of the penalty enhancers (like commission of the crime while armed with a dangerous weapon) has been pleaded and proved. In these instances the maximum term of confinement increases according to schedules in the Statutes and the overall maximum term of imprisonment increases by a like amount. The maximum term of extended supervision, however, does not increase.

For example, suppose that one has been convicted of the crime of assault by a prisoner[30] while armed with a dangerous weapon. The Committee recommends that the base offense be classified as a Class F felony, which carries a maximum term of confinement of 7.5 years and a maximum term of extended supervision of 5 years for a total maximum term of imprisonment of 12.5 years. The dangerous weapon penalty enhancer adds 5 years to the maximum term of confinement for the underlying assault charge while likewise increasing the overall maximum term of imprisonment by the same amount. It does not, however, increase the maximum term of extended supervision. Therefore, the judge could sentence the offender to a maximum term of confinement in the amount of 12.5 years followed by a maximum term of extended supervision in the amount of 5 years. Given the purposes of extended supervision, the Committee believes this amount is sufficient. It does not recommend adjusting extended supervision caps when penalty enhancers (including habitual criminality) are present in the case.

Finally, it should be noted that Act 283 makes no provision for extended supervision for misdemeanants who are sentenced to prison. The Committee believes that those misdemeanants who are dangerous enough to be sent to prison should be subject to supervision upon release from prison. Both community safety and offender rehabilitation goals would be advanced by such supervised transitioning upon release from prison. Suggested legislation is attached to this report.

d. Probation. Current law provides that the original term of probation for a person convicted of a felony shall be for not less than one year nor more than either the statutory maximum term of imprisonment for the crime or three years, whichever is greater.[31] If the defendant is convicted at the same time of two or more crimes, including at least one felony, the maximum original term of probation may be increased by one year for each felony conviction.[32] There is also a specific schedule of original terms of probation for those convicted of one or more misdemeanors.[33]

Act 283 did not amend the statutes regulating maximum original terms of probation. The Committee has considered them and recommends that the maximum original term of probation for Class B, C, D, E, F, G, and H felonies be linked to the maximum term of confinement for crimes in those classes. Probation is not an option for

[29] See Wis. Stat. sec. 939.62.
[30] Wis. Stat. sec. 946.43.
[31] Wis. Stat. sec. 973.09(2)(b)1.
[32] Wis. Stat. sec. 973.09(2)(b)2.
[33] See Wis. Stat. sec. 973.09(2)(a).

Class A felonies and therefore Class A is omitted from the list in the preceding sentence. With regard to Class I felonies, the Committee recommends that that the maximum original term of probation be three years.[34] No change is recommended in the statute requiring that a term of probation in a felony case be for a minimum of one year. Nor is there any recommendation for amending the statutes governing the length of probation in misdemeanor cases.

If the Committee's recommendations are adopted, the maximum original term of probation for a single felony would be as follows:

Class A felony	---[35]
Class B felony	40 years
Class C felony	25 years
Class D felony	15 years
Class E felony	10 years
Class F felony	7.5 years
Class G felony	5 years
Class H felony	3 years
Class I felony	3 years

Having considered the recommended assignment of felonies in the new A-I felony classification system, the Committee believes that the dual objectives of probation (rehabilitation of the offender and protection of the state and community interest)[36] can be achieved within the time periods described above.

4. Method of Converting Crimes to the New A-I Classification System and Factors Influencing the Classification of Crimes

Crimes were initially placed in the new A-I classification system by determining the mandatory release (M.R.) date under current law when a court imposes the maximum sentence. As a general rule M.R. is fixed by statute at two-thirds of the sentence actually imposed.[37] For the offender who receives the maximum sentence, M.R. is two-thirds of that maximum. Service of the sentence to M.R. reflects the longest period the defendant can be held in prison before being mandatorily paroled.[38] That parole is subject to revocation and the defendant may be returned to prison if conditions of parole are violated.

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[34] This recommendation is consistent with current law which provides that the maximum original term of probation shall be for not more than the maximum period of imprisonment for the crime of conviction or three years, whichever is greater. See Wis. Stat. sec. 973.09(2)(b)1.

[35] Probation is not an available disposition for Class A felony offenses. See Wis. Stat. sec. 973.09(1)(c).

[36] See State v. Miller, 175 Wis. 2d 204, 499 N.W.2d 215 (Ct. App. 1993).

[37] Wis. Stat. sec. 302.11(1). There is no mandatory release for persons sentenced to life imprisonment. See Wis. Stat. sec. 302.11(1m).

[38] For certain serious felonies mandatory release upon service of 2/3rds of the sentence is presumptive but may be denied by the Parole Commission. See Wis. Stat. sec. 302.11(1g).

The Committee concluded that the maximum term of confinement for each crime in the new Truth-in-Sentencing system ought to roughly parallel the maximum the person could serve in prison under the current indeterminate sentencing law before reaching M.R. To allow for the worst case scenario of a prisoner who under current law is held to M.R., the Committee applied the M.R. converter to the maximum possible sentence under current law before classifying each crime in the new A-I classification system. Once this initial calculation using M.R. was accomplished, the Committee then applied the criteria described below to determine whether any class adjustments were necessary.

The Committee believes that use of the M.R. converter to locate crimes in the new A-I classification system in no way conflicts with its understanding of the legislative intent underlying the movement to Truth-in-Sentencing. The clear message of Act 283 is that the legislature wants "absolute truth" in the sentencing process such that everyone (judges, prosecutors, defense attorneys, defendants, victims, witnesses, corrections officials and the public) knows that the offender will serve the entire confinement portion of the prison sentence and the subsequent period of extended supervision as ordered by the court at sentencing. Act 283 does not require the imposition of longer prison sentences nor does it suggest that offenders should be held in confinement for periods of time longer than under current law. What it requires is "truth" in the meaning of sentences and the Committee believes its method for classifying crimes is fully compatible with that requirement. In the Committee's view, use of the present law mandatory release period to classify crimes in the new A-I classification system maintains consistency in the maximum time an inmate can serve in prison prior to first release as Wisconsin moves from an indeterminate sentencing system to a Truth-in-Sentencing system.

Example: Under current law, the offense of burglary is classified as a Class C felony for which the maximum possible term of imprisonment is 10 years. If the judge sentences the defendant to the full 10-year term and he or she is held in custody until M.R., release to parole will occur after 6 2/3rds years. Using 6 2/3rds years as the "M.R. converter," the closest felony class in the new A-I system is Class F, for which the maximum period of incarceration is 7.5 years. Thus, as an initial matter, burglary would be categorized in Class F and the defendant sentenced to the maximum could actually serve slightly more time in prison than a burglar sentenced to the maximum under current law who serves to M.R. Following release from the institution, the defendant will be subject to extended supervision for up to 5 years for this Class F offense (an increase from the 3 1/3 years of parole under current law). Thus, under this proposal, the maximum term of confinement and the maximum period of community supervision for burglary have been increased.

a. Felony Class Adjustments. After application of the M.R. converter to initially place a crime in one of the new A-I classes, the Committee considered whether an adjustment up or down was necessary so that crimes of similar severity are classified together.[39] This was done in response to a specific charge from the legislature.[40] In

[39] The Committee utilized numerous tables to depict the flow of crimes through the proposed A-I classification system. Some of these are included in this report. The tables allowed the Committee to

making its final determination about the classification of offenses, the Committee also endeavored to:

- Allow enough incarceration exposure for the "worst case-worst offender" scenario in the single count context.[41] In making this assessment the Committee recognizes that the vast majority of crimes are less serious than the "worst case" and are committed by someone other than the "worst offender." For these situations the appropriate disposition within the statutory maximum for the crime of conviction is left to judicial discretion (as assisted by sentencing guidelines to the extent guidelines are available). However, the Committee also recommends preservation of the habitual criminality statute[42] and certain penalty enhancers to allow for those cases where the maximum penalty for the underlying crime is insufficient.

- Show proper deference to judgments already made by the legislature about the relative severity of offenses.

- Classify crimes that involve death or serious injury (or the potential for such harm) in higher categories than those involving offenses against property or other non-violent behavior.

- Classify crimes involving similar harms according to the state of mind of the actor at the time of the criminal act.

- Consider data about sentencing patterns and time actually served for offenses under current law when such data was available and when the Committee had some measure of confidence in its reliability.

- Account for the political reality that its recommendations must ultimately survive the scrutiny of both the legislature and the governor in order to become law.

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verify that related crimes are properly positioned in the classification system according to severity and to fulfill its charge to classify crimes of like severity in the same felony class.

[40] See 1997 Wis. Act 283 sec. 454(1)(e)2.

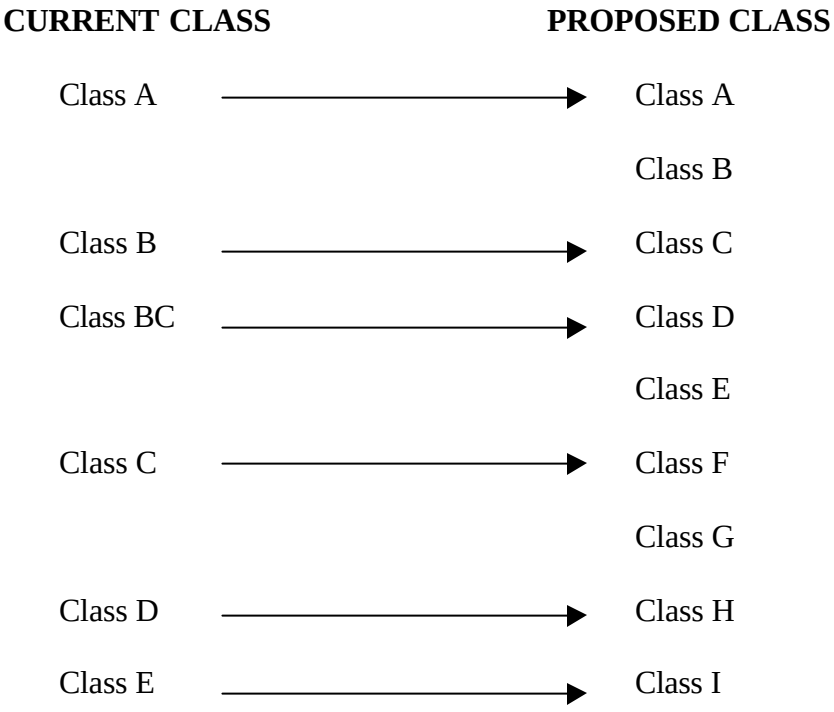
[41] The Committee recognizes that in many cases the defendant faces sentencing on multiple counts. However, in the process of classifying offenses, it had to determine the appropriate maximum sentence for each felony and Class A misdemeanor in the context of the defendant who faces sentencing on a single count. As a practical matter, there was no other way to approach the classification task.

[42] Wis. Stat. sec. 939.62.

D. Classification of Criminal Code Felonies

1. Introduction

When the mandatory release (M.R.) converter is applied to move crimes from the six felony classes under current law to the proposed nine-class system, the natural flow of crimes may be depicted as follows:



Application of the M.R. converter thus means that current Class A felonies flow naturally to proposed Class A, current Class B felonies flow naturally to proposed Class C, current Class BC felonies flow naturally to proposed Class D, current Class C felonies flow naturally to proposed class F, current Class D felonies flow naturally to proposed Class H, and current Class E felonies flow naturally to proposed Class I. Although a crime in the new system may have a class designation different from present law, the impact of the natural flow depicted above is that the maximum time of confinement in prison until first release is roughly the same.

As a result of applying the M.R. converter, no existing Criminal Code crimes have a natural placement in proposed Class B, E or G. These "empty" categories were thus available to the Committee when application of its classification criteria suggested that a crime needed an upward or downward adjustment from wherever the M.R. converter naturally placed it. These "empty" categories were also very useful when the Committee undertook the task of classifying drug crimes and other felonies that are presently unclassified.

Before presenting its proposal for the classification of Criminal Code felonies (and all other felonies for that matter), the Committee makes one further introductory observation. The classification of a felony offense establishes the maximum incarceration, maximum fine, and maximum period of extended supervision when the court sentences a defendant **on a single count**. If a criminal episode involves the commission of several crimes, the defendant will upon conviction face multiple sentences which may either be concurrent with or consecutive to one another.

2. Proposed Classification of Criminal Code Felonies

COLOR CODES

ENTRIES IN GREEN REFLECT UPWARD CLASS ADJUSTMENT AFTER APPLICATION OF M.R. CONVERTER.

ENTRIES IN BLUE REFLECT NEW CRIMES RECOMMENDED FOR ENACTMENT BY THE LEGISLATURE OR EXISTING CRIMES FOR WHICH SIGNIFICANT AMENDMENTS ARE PROPOSED.

ENTRIES IN RED REFLECT DOWNWARD CLASS ADJUSTMENT AFTER APPLICATION OF M.R. CONVERTER.

ENTRIES IN BLACK REFLECT THE NATURAL PLACEMENT OF CRIMES IN A-I SYSTEM AFTER APPLICATION OF THE M.R. CONVERTER.

NOTE: Each entry in green and red is accompanied by a parenthetical which indicates "from ____." Red and green entries mean that an adjustment has been made either upward (green) or downward (red) from the felony class where a crime would naturally be placed by application of the M.R. converter. The "from" indicates where natural placement would be in the new Class A-I system.

CLASS A FELONIES (LIFE)

1st Degree Intentional Homicide	940.01(1)(a) & (b)
Partial-Birth Abortion	940.16(2)
Absconding after being adjudicated delinquent for a Class A felony[43]	946.50(1)
Treason	946.01(1)

[43] This crime appears in each of the felony classes. It addresses the problem of the juvenile who has been adjudicated delinquent but then absconds before his/her dispositional hearing. See discussion of juvenile absconding at p. 67.

CLASS B (40 MAX PRISON; 20 E.S.)

Absconding after being adjudicated delinquent for a Class B felony[44]	946.50(2)
Conspiracy to commit a crime for which the penalty is life imprisonment (from C)	939.31
Attempt to commit a crime for which the penalty is life imprisonment (from C)	939.32(1)(a)
1st Degree Reckless Homicide (from C)	940.02(1) and (1m)
2nd Deg. Intentional Homicide (from C)	940.05(1) & (2g)
1st Degree Sexual Assault (from C)	940.225(1)
1st Deg. Sex Assault of a Child (from C) [45]	948.02(1)
Repeated Sexual Assault of Same Child (from C) [46]	948.025
Kidnapping (Aggravated) (from A)	940.31(2)(a)
Hostage Taking (Aggravated) (from A)	940.305(1)

CLASS C (25 MAX PRISON; 15 E.S.)

1st Deg. Reckless Homicide ("Len Bias" Law)	940.02(2)
Mayhem	940.21
Abuse of Vulnerable Adult (intentional or reckless maltreatment resulting in death)	940.285(2)(b)1g
Abuse & Neglect of Patients & Residents (intentional or reckless abuse or neglect resulting in death of "vulnerable" person)	940.295(3)(b)1g
Hostage Taking (Unaggravated)	940.305(2)
Kidnapping (Unaggravated)	940.31(1) & (2)(b)
Arson of buildings	943.02
Carjacking	943.23(1g)
Armed Robbery	943.32(2)
Absconding after being adjudicated delinquent for a Class C felony[47]	946.50(3)

[44] This crime appears in each of the felony classes. It addresses the problem of the juvenile who has been adjudicated delinquent but then absconds before his/her dispositional hearing. See discussion of juvenile absconding at p. 67.

[45] This crime has a 5-year enhancer if the defendant is a person responsible for the welfare of the child. The Committee recommends that this enhancer be recast as a statutory sentencing aggravator. The underlying offense is classified as a B felony and confinement for up to 40 years followed by extended supervision for up to 20 years is sufficient to deal with circumstances where the aggravator is present.

[46] This crime should be a Class B felony only if the proof demonstrates that the repeated assaults all constituted violations of the First Degree Sexual Assault of a Child statute.

This crime has a 5-year enhancer if defendant is a person responsible for the welfare of the child. The Committee recommends that the enhancer be recast as a statutory sentencing aggravator. The underlying offense is classified as a B felony and confinement for up to 40 years followed by extended supervision for up to 20 years is sufficient to deal with circumstances where the aggravator is present.

[47] This crime appears in each of the felony classes. It addresses the problem of the juvenile who has been adjudicated delinquent but then absconds before his/her dispositional hearing. See discussion of juvenile absconding at p. 67.

CLASS C (25 MAX PRISON; 15 E.S.) (continued)

Repeated Sexual Assault of Same Child [48]	948.025
Abduction of Another's Child by Force or Threat of Force	948.30(2)
2nd Degree Sexual Assault (from D)	940.225(2)
2nd Deg. Sex Assault of Child (from D)[49]	948.02(2)
Incest with a Child (from D)	948.06
Tampering with Household Products (causing death) (from A)	941.327(2)(b)4
Homicide by Intoxicated Use of Vehicle (Repeater with 1 or more Prior OWI-type convictions) – NEW CRIME[50]	940.09

CLASS D (15 MAX PRISON; 10 E.S.)

Absconding after being adjudicated delinquent for a Class D felony[51]	946.50(4)
Child Enticement	948.07
Soliciting a Child for Prostitution	948.08
2nd Degree Reckless Homicide (from F)	940.06
Homicide by Intoxicated Use of Firearm (from H)	940.09(1g)
1st Degree Reckless Injury (from F)	940.23(1)(a) & (b)
Child Neglect Resulting in Death (from F)	948.21(1)

[48] This crime should be a Class C felony if the evidence shows three or more violations of the Sexual Assault of a Child statute committed against the same victim within a specified period of time but fails to demonstrate that at least three of the repeated assaults all constituted violations of the First Degree Sexual Assault of a Child statute.

This statute has a 5-year enhancer if the defendant is a person responsible for the welfare of the child. The Committee recommends that this enhancer be recast as a statutory sentencing aggravator. The underlying offense is classified as a B felony under and confinement for up to 40 years followed by extended supervision for up to 20 years is sufficient to deal with circumstances where the aggravator is present.

[49] This statute has a 5-year enhancer if the defendant is a person responsible for the welfare of the child. The Committee recommends that this enhancer be recast as a statutory sentencing aggravator. The underlying offense is classified as a C felony and confinement for up to 25 years followed by extended supervision for up to 15 years is sufficient to deal with circumstances where the aggravator is present.

[50] See discussion of homicide crimes at p. 43 for a description of this offense.

This statute has a penalty doubler if there was a minor passenger in vehicle at the time of the offense. The Committee recommends that this penalty doubler be recast as a statutory sentencing aggravator. The underlying offense is classified as a C felony and confinement for up to 25 years followed by extended supervision for up to 15 years is sufficient to deal with circumstances where the aggravator is present.

[51] This crime appears in each of the felony classes. It addresses the problem of the juvenile who has been adjudicated delinquent but then absconds before his/her dispositional hearing. See discussion of juvenile absconding at p. 67.

CLASS D (15 MAX PRISON; 10 E.S.) (continued)

Contributing to Delinquency of a Child (if death is a consequence (from F)	948.40(4)(a)
Homicide by Intoxicated Use of Vehicle (No Prior OWI-Type Record) (from C)[52]	940.09(1)
Abuse of Vulnerable Adult (negligent maltreatment resulting in death)	940.285(2)(b)1g[53]
Abuse & Neglect of Patients & Residents (negligent abuse or neglect resulting in death of "vulnerable" person)	940.295(3)(b)1g[54]

CLASS E (10 MAX PRISON; 5 E.S.)

Absconding after being adjudicated delinquent for a Class E felony[55]	946.50(5)
Abortion	940.04(2)[56]
Fleeing an Officer Causing Death (from H)	346.04(3) & 346.17(3)(d)[57]
Abuse & Neglect of Patients & Residents (intentional, reckless or negligent abuse or neglect causing great bodily harm to a vulnerable person) (from F)	940.295(3)(b)1m
Robbery (Unarmed) (from F)	943.32(1)
Contributing to Death: Obstructing Emergency or Rescue Personnel (from F)	941.37(4)
Engaging in Racketeering Activity (from F)	946.84(1)
Physical Abuse of a Child (intentionally causing great bodily harm) (from F)	948.03(2)(a)
Abduction of Another's Child (from F)	948.30(1)

[52] See discussion of homicide crimes at p. 43 for a description of this offense.

This statute has a penalty doubler if there was a minor passenger in vehicle at the time of the offense. The Committee recommends that this penalty doubler be recast as a statutory sentencing aggravator. The underlying offense is classified as a D felony and confinement for up to 15 years followed by extended supervision for up to 10 years is sufficient to deal with circumstances where the aggravator is present.

[53] This crime is listed as "new" because it breaks out negligent maltreatment resulting in death and classifies it at a lower level than intentional or reckless maltreatment resulting in death.

[54] This crime is listed as "new" because it breaks out negligent abuse or neglect resulting in death and classifies it at a lower level than intentional or reckless abuse or neglect resulting in death.

[55] This crime appears in each of the felony classes. It addresses the problem of the juvenile who has been adjudicated delinquent but then absconds before his/her dispositional hearing. See discussion of juvenile absconding at p. 67.

[56] Sec. 940.04(2) is part of the pre-Roe v. Wade abortion statute. The text of the abortion crimes codified in Wis. Stat. sec. 940.04 dates back to the 1956 revision of the Criminal Code. When the legislature instituted a classification system for Criminal Code felonies and misdemeanors in 1977, it did not classify the crimes in sec. 940.04. 1997 Wisconsin Act 283 charges the Criminal Penalties Study Committee with classifying all felonies. Thus these crimes are now recommended for classification. However, the Committee recommends that the legislature independently study whether sec. 940.04 should be repealed given the fact that post-Roe v. Wade abortion statutes now exist at secs. 940.13 and 940.15.

[57] See discussion of Fleeing an Officer at p. 56.

CLASS E (10 MAX PRISON; 5 E.S.) (continued)

Aggravated Burglary (from C)	943.10(2)
Continuing Criminal Enterprise (from D)	946.85(1)
Aggravated Battery	NEW[58]
Aggravated Battery to Unborn Child	NEW[59]

CLASS F (7.5 MAX PRISON; 5 E.S.)

Solicitation: Crime for which Penalty is Life Imprisonment	939.30(2)
Mutilating a Corpse	940.11(1)
Endangering Safety: Discharge Firearm from Vehicle	941.20(3)(a)
Sexual Exploitation by Therapist	940.22(2)
Abuse of Vulnerable Adults (intentional, reckless or negligent maltreatment causing great bodily harm)	940.285(2)(b)1m
Abuse & Neglect of Patients & Residents (intentional abuse or neglect causing great bodily harm)	940.295(3)(b)1r
Modifying Firearm to Make It a Machine Gun	941.26(1m) & (2)(b)
Possession of Explosives	941.31(1)
Administering Dangerous/Stupefying Drug to Facilitate Crime	941.32
Tampering with Household Products (causing great bodily harm)	941.327(2)(b)3
Burglary (Unaggravated)	943.10(1)
Loan Sharking	943.28
Unlawful Receipt of Payments to Obtain Loan for Another (<$2500)	943.62(4)(c)
Computer Crimes (risk of death or great bodily harm to another)	943.70(2)(b)4
Computer Crimes (risk of death or great bodily harm)	943.70(3)(b)4
Incest	944.06
Pandering (if compensated from earnings of prostitute)	944.33(2)
Sabotage	946.02(1)
Sedition	946.03(1)
Assaults by Prisoners	946.43
Public Officer or Employee Assisting or Permitting Escape	946.44(1g)

[58] The proposed version of Aggravated Battery is similar to that codified in Wis. Stat. sec. 940.19(5). The proposed statute would read as follows: "Whoever causes great bodily harm to another by an act done with intent to cause great bodily harm to that person or another is guilty of a Class E felony." See discussion of the general battery statutes at p. 48.

[59] The proposed version of Aggravated Battery to Unborn Child is similar to that codified in 940.195(2). The proposed statute would read as follows: "Whoever causes great bodily harm to an unborn child by an act done with intent to cause great bodily harm to that unborn child, to the woman who is pregnant with that unborn child or another is guilty of a Class E felony." See discussion of the general battery statutes at p. 48.

CLASS F (7.5 MAX PRISON; 5 E.S.) (continued)

Bringing Firearm into Prison or Jail; Transferring Firearm to Prisoner	946.44(1m)
Failure to Prevent Sexual Assault of a Child	948.02(3)
Physical Abuse of a Child (intentionally causing bodily by conduct which creates high probability of great bodily harm)	948.03(2)(c)
Failure to Prevent Great Bodily Harm to a Child	948.03(4)(a)
Causing Mental Harm to a Child	948.04
Sexual Exploitation of a Child	948.05(1), (1m) & (2)[60]
Causing a Child under 13 to View or Listen to Sexual Activity	948.055(2)(a)
Child Sex Offender Working with Children	948.13(2)
Interference with Custody of Child with Intent to Deprive Custody Rights; Concealing Child	948.31(1)(b) & (3)
Fleeing an Officer Causing Great Bodily Harm (from I)	346.04(3) & 346.17(3)(c)[61]
2nd Degree Reckless Injury (from H)	940.23(2)(a) & (b)
Injury by Intoxicated Use of Vehicle (from H)[62]	940.25
1st Deg. Reck. Endang. Safety (from H)	941.30(1)
Absconding after being adjudicated delinquent for a Class F felony	NEW[63]

CLASS G (5 MAX PRISON; 5 E.S.)

Homicide:Neg. Use of Weapon (from H)	940.08(1) & (2)
Homicide:Neg. Use of Vehicle (from I)	940.10(1) & (2)
Hiding a Corpse (from H)	940.11(2)
3rd Degree Sexual Assault (from H)	940.225(3)
Abuse of Vulnerable Adult (intentional maltreatment under circumstances likely to cause great bodily harm) (from H)	940.285(2)(b)1r
Abuse & Neglect of Patients & Residents (intentional abuse under circumstances that are likely to cause great bodily harm) (from H)	940.295(3)(b)1r
Stalking (aggravated)[64] (from H)	940.32(2m) & (3m)

[60] The classification of the crimes codified in sec. 948.05 includes amendments to that statute enacted in 1999 Wisconsin Act 3.

[61] See discussion of Fleeing an Officer at p. 56.

[62] This statute has a penalty doubler if there was a minor passenger in vehicle at the time of the offense. The Committee recommends that this penalty doubler be recast as a statutory sentencing aggravator. The underlying offense is classified as a F felony and confinement for up to 7.5 years followed by extended supervision for up to 5 is sufficient to deal with circumstances where the aggravator is present.

[63] This crime appears in each of the felony classes. It addresses the problem of the juvenile who has been adjudicated delinquent but then absconds before his/her dispositional hearing. See discussion of juvenile absconding at p. 67.

CLASS G (5 MAX PRISON; 5 E.S.) (continued)

Felony Intimidation of a Witness (from H)	940.43
Felony Intimidation of a Victim (from H)	940.45
Possession of Firearm by Felon (from I)	941.29
2nd Deg. Reck. Endang. Safety (from I)	941.30(2)
Endangering Safety: Firing into Vehicle/Bldg (from I)	941.20(2)
Theft from Person (from H)[65]	943.20(3)(d)2
Physical Abuse of Child (recklessly causing great bodily harm) (from H)	948.03(3)(a)
Child abandonment (from H)	948.20
Discharge of Firearm in a School Zone (from A misd.)	948.605(3)(a)
Homicide: Neg.Control of Vicious Animal (from F)	940.07
Theft (> $10,000)	NEW[66]
Receiving Stolen Property (> $10,000)	NEW[67]
Fraudulent Use of Financial Transaction Card (> $10,000)	NEW[68]
Retail Theft (> $10,000)	NEW[69]
Receiving Stolen Property from a Child (> $5000)	NEW[70]

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[64] The crime of stalking is aggravated if the defendant intentionally gains access to certain records in order to facilitate the violation or if defendant has a prior stalking or harassment conviction.

[65] Extracted from Wis. Stat. sec. 943.20(3)(d) but remove value requirement.

[66] The ordinary crime of Theft (Wis. Stat. sec. 943.20) is classified in Felony Classes G, H and I and in Misdemeanor Class A according to the value of the property stolen. The crimes are designated as "new" in the sense that the values used to differentiate the penalties are different than those used in present law.

[67] The crime of Receiving Stolen Property (Wis. Stat. sec. 943.34) is classified in Felony Classes G, H and I and in Misdemeanor Class A according to the value of the property involved. The crimes are designated as "new" in the sense that the values used to differentiate the penalties are different than those used in present law.

[68] The crime of Fraudulent Use of a Financial Transaction Card (penalty in Wis. Stat. sec. 943.41(8)(c)) is classified in Felony Classes G, H and I and in Misdemeanor Class A according to the value of the money, goods, services or property illegally obtained. The crimes are designated as "new" in the sense that the values used to differentiate the penalties are different than those used in present law.

[69] The crime of Retail Theft (Wis. Stat. sec. 943.50) is classified in Felony Classes G, H and I and in Misdemeanor Class A according to the value of the property involved. The crimes are designated as "new" in the sense that the values used to differentiate the penalties are different than those used in present law.

[70] The crime of Receiving Stolen Property from a Child (Wis. Stat. sec. 948.62) is classified in Felony Classes G, H and I and in Misdemeanor Class A according to the value of the property involved. The crimes are designated as "new" in the sense that the values used to differentiate the penalties are different than those used in present law. The value cutoffs are lower than those used in the Receiving Stolen Property statute (Wis. Stat. sec. 943.34) and other companion statutes like theft and retail theft to take into account the fact that the stolen property is received from a child.

The Committee recommends retaining the $500 value codified in Wis. Stat. sec. 948.62(2)(a). It constitutes part of the prima facie proof that the property received from a child was stolen and that the person receiving the property knew it was stolen.

CLASS G (5 MAX PRISON; 5 E.S.) (continued)

Hazing Resulting in Death	NEW[71]
Absconding after being adjudicated delinquent for a Class G felony	NEW[72]

CLASS H (3 MAX PRISON; 3 E.S.)

Solicitation to Commit a Felony (other than A or I)	939.30(1)
Abortion	940.04(1)[73]
Assisting Suicide	940.12
Battery (causing great bodily harm by an act done with intent to cause bodily harm)	940.19(4)[74]
Battery (intentionally causing bodily harm to another by conduct that creates substantial risk of great bodily harm)	940.19(6)[75]
Battery to Unborn Child (causing great bodily harm by an done with intent to cause bodily harm)	940.195(4)[76]
Battery by Prisoners	940.20(1)
Battery to Law Enforcement Officers & Firefighters	940.20(2)
Battery to Probation and Parole Agents and Aftercare Agents	940.20(2m)(b)
Battery to Jurors	940.20(3)
Battery to Emergency Department Workers, EMT's, etc.	940.20(7)(b)
Battery or Threat to Witnesses	940.201
Battery or Threat to Judge	940.203(2)
Battery or Threat to Dep't of Revenue Employe	940.205(2)
Battery or Threat to Dep't of Commerce & Workforce Dev.	940.207(2)
Unsafe Burning of Buildings	941.11
Using Tear Gas Device: Bodily Harm to Peace Officer	941.26(2)(f)
Using Pepper Spray Device: Bodily Harm to Peace Officer	941.26(4)(d)
Delivery of Nitrous Oxide	941.315(3)

[71] The Committee recommends classifying hazing resulting in death at the G felony level, thus providing for a greater penalty when death results and a lesser penalty (H felony) when great bodily harm results. See Wis. Stat. sec. 948.51(3)(b).

[72] This crime appears in each of the felony classes. It addresses the problem of the juvenile who has been adjudicated delinquent but then absconds before his/her dispositional hearing. See discussion of juvenile absconding at p. 67.

[73] Wis. Stat. sec. 940.04(1) is part of the pre-Roe v. Wade abortion statute. The text of the crimes codified in sec. 940.04 dates back to the 1956 revision of the Criminal Code. When the legislature instituted a classification system for Criminal Code felonies and misdemeanors in 1977, it did not classify the crimes in sec. 940.04. 1997 Wisconsin Act 283 charges the Criminal Penalties Study Committee with classifying all felonies. Thus these crimes are now recommended for classification. However, the Committee recommends that the legislature independently study whether sec. 940.04 should be repealed given the fact that post-Roe v. Wade abortion statutes now exist at secs. 940.13 and 940.15.

[74] See discussion of the general battery statutes at p. 48.

[75] See discussion of the general battery statutes at p. 48.

[76] See discussion of the general battery statutes at p. 48.

CLASS H (3 MAX PRISON; 3 E.S.) (continued)

Tampering with Household Products (if act creates a high probability of great bodily harm to another)	941.327(2)(b)2
Arson with Intent to Defraud	943.04
Theft (agg. circumstances[77])	943.20(3)(d)
Misappropriation of Personal Identifying Information or Personal Identification Documents	943.201
Operating Vehicle Without Owner's Consent ("take & drive")	943.23(2)
Threats to Injure or Accuse of a Crime	943.30
Fraudulent Writings	943.39
Fraudulent Destruction of Certain Writings	943.40
Criminal Slander of Title	943.60(1)
Crime against Computers[78] (amend amt to > 5000)	943.70(2)(b)3 or (3)(b)3
Obscenity (if 2 or more prior obscenity violations or if crime involves wholesale transfer or distribution of obscene material)	944.21(5)(c) & (e)
Soliciting Prostitutes	944.32
Keeping Place of Prostitution	944.34
Bribery of Participant in a Contest	945.08(1)
Bribery of Public Officers and Employees	946.10
Perjury	946.31
False Swearing	946.32(1)
Felony Escape	946.42(3)
Obstructing Officer (by providing information or or evidence that results in conviction of innocent person)	946.41(2m)
Felony Failure to Report to Jail	946.425(1), (1m)(b) & (1r)(b)

[77] See Wis. Stat. sec. 943.20(3)(d) but remove requirement that the value of the property stolen does not exceed $2,500. The Committee recommends that when a theft is committed under aggravated circumstances (property taken is a domestic animal; property is taken from a building which has been destroyed or left unoccupied because of physical disaster, riot, bombing or the proximity of battle; property is taken after physical disaster, riot, bombing or the proximity of battle has necessitated its removal from a building; property taken is a firearm; or property is taken from a patient or resident of a facility or program under Wis. Stat. sec. 940.295(2) or from a vulnerable adult), the offense should be classified as a Class H felony. Normally this will be an upward adjustment of the what would otherwise be a lower level crime because the value of the property involved would put it in the Class I felony or Class A misdemeanor range. However, if the value of the property would put the theft in the Class H range (more than $5,000 but not exceeding $10,000), the prosecutor could pursue either an aggravated theft charge under Wis. Stat. sec. 943.20(3)(d) or an ordinary Class H theft charge under proposed sec. 943.20(3)(bm) (no proof of aggravated circumstances required). And, of course, if the value of the property exceeds $10,000, the prosecutor may proceed with a Class G felony under proposed sec. 943.20(3)(c) (no proof of aggravated circumstances required).

[78] This felony is committed if the damage is greater than $2500 or if it causes an interruption or impairment of governmental operations or public communication, of transportation or of a supply of water, gas or other public service. The Committee recommends elevating the damage cutoff referred to in the preceding sentence to $5000 in order to maintain consistency with other Class H felonies having a value level.

CLASS H (3 MAX PRISON; 3 E.S.) (continued)

Assisting or Permitting Escape	946.44(1)
False Information re: Kidnapped or Missing Persons	946.48(1)
Bail Jumping	946.49(1)(b)
Bribery of a Witness	946.61(1)
Simulating Legal Process (if the act is meant to induce payment of claim or simulates criminal process)	946.68(1r)(b) & (c)
Impersonating a Peace Officer (with intent to commit a Crime or aid & abet commission of a crime)	946.70(2)
Tampering with Public Records	946.72(1)
Aiding Escape from Mental Institution (with intent to commit crime against sexual morality with or upon the inmate of the institution)	946.74(2)
Harassment (if defendant has prior conviction or intentionally gains access to certain records in order to facilitate the violation)	947.013(1v) & (1x)
Physical Abuse of a Child (intentionally causing bodily harm)	948.03(2)(b)
Physical Abuse of a Child (recklessly causing bodily harm by conduct creating a high probability of great bodily harm)	948.03(3)(c)
Failing to Act to Prevent Bodily Harm to a Child	948.03(4)(b)
Causing Child between 13 and 17 to View or Listen to Sexual Activity	948.055(2)(b)
Sexual Assault of Student by a School Instructional Staff Person	948.095(2)
Unauthorized Placement for Adoption	948.24(1)
Contributing to Delinquency of a Child (if child's act which is encouraged or contributed to is a violation of criminal law punishable as a felony)	948.40(4)(b)
Selling or Giving Dangerous Weapon to Person under 18 (if the person under 18 discharges the firearm and the discharge causes the death of any person)	948.60(2)(c)
Instigating Fights between Animals (2nd or subsequent violation)	951.18(2)
Harassment of Police or Fire Department Animals (causing death to the animal)	951.18(2m)
Fleeing an Officer Causing Bodily Harm (from I)	346.04(3) & 346.17(3)(b)[79]
Abuse of Vulnerable Adult (intentional maltreatment causing bodily harm) (from I)	940.285(2)(b)2
Abuse & Neglect of Patients & Residents (intentional abuse or neglect causing bodily harm) (from I)	940.295(3)(b)2

[79] See discussion of Fleeing an Officer at p. 56.

CLASS H (3 MAX PRISON; 3 E.S.) (continued)

Abuse & Neglect of Patients & Residents (reckless or negligent abuse or neglect causing great bodily harm) (from I)	940.295(3)(b)3
False Imprisonment (from I)	940.30
Stalking (if victim suffers bodily harm or defendant has prior conviction against same victim)	940.32(3)
Disarming a Peace Officer	941.21
Selling, Possessing, Using or Transporting Machine Gun (from I)	941.26(2)(a)
Sale or Commercial Transportation of Tear Gas Device (from I)	941.26(2)(e)
Using or Threatening to Use a Tear Gas or Pepper Spray Device during Commission of a Crime to Cause Bodily Harm or Bodily Discomfort to Another (from I)	941.26(2)(g) & (4)(e)
Selling, Transporting or Possessing a Short-Barreled Shotgun or Rifle (from I)	941.28(3)
Selling, Manufacturing or Possessing an Electric Weapon (from I)	941.295(1)
Using or Possessing a Handgun with Armor Piercing Bullets during Commission of Certain Crimes (from I)	941.296(2)
Selling, Delivering or Possessing a Firearm Silencer (from I)	941.298(2)
Making, Transferring, Possessing or Using an Improvised Explosive Device or Possessing Materials or Components with Intent to Assemble an Improvised Explosive Device (from I)	941.31(2)(b)
Possession, Manufacture or Transfer of a Fire Bomb (from I)	943.06(2)
Hazing Resulting in Great Bodily Harm (from I)[80]	948.51(3)(b)
Forgery and Forgery-Uttering (from F)	943.38(1) & (2)
Theft of Library Material (> $2500) (from F)	943.61(5)(c)
Theft (> $5000 but < $10,000)	NEW[81]
Receiving Stolen Property (> $5000 but < $10,000)	NEW[82]
Fraudulent Use of Financial Transaction Card (> $5000 but < $10,000)	NEW[83]
Retail Theft (> $5000 but < $10,000)	NEW[84]

[80] If death results from the hazing, the Committee recommends that the offense be classified as a G felony. This will necessitate amending the statute to provide penalties when a death is involved.
[81] See footnote to crime of Theft (943.20) in Class G list.
[82] See footnote to crime of Receiving Stolen Property (943.34) in Class G list.
[83] See footnote to crime of Fraudulent Use of Financial Transaction Card (943.41) in Class G list.
[84] See footnote to crime of Retail Theft (943.50) in Class G list.

CLASS H (3 MAX PRISON; 3 E.S.) (continued)

Receiving Stolen Property from a Child (> $2000 but < $5000)	NEW[85]
Absconding after being adjudicated delinquent for a Class G felony	NEW[86]

CLASS I (18 mo. MAX PRISON; 2 yrs. E.S.)

Violation of a Condition of Lifetime Supervision of Serious Sex Offenders	939.615(7)(b)2[87]
Abortion	940.04(4)[88]
Abortion (various provisions)	940.15(2),(5) & (6)[89]
Battery (causing substantial bodily harm by an act done with intent to cause bodily harm)	940.19(2)[90]
Battery to Unborn Child (causing substantial bodily harm by an act done with intent to cause bodily harm)	940.195(2)[91]
Battery by Persons Subject to Certain Injunctions	940.20(1m)
Battery to Public Officers	940.20(4)
Battery to Technical College/School District Employees	940.20(5)
Battery to Public Transit Vehicle Operator, Driver or Passenger	940.20(6)
Injury by Negligent Handling of Dangerous Weapon, Explosives or Fire	940.24
Abuse of Vulnerable Adult (reckless or negligent maltreatment under circumstances likely to cause great bodily harm)	940.285(2)(b)1r
Abuse of Residents of Penal Facilities	940.29
Interfering with Fire Fighting	941.12(1)

[85] See footnote to crime of Receiving Stolen Property from a Child (948.62) in Class G list.

[86] This crime appears in each of the felony classes. It addresses the problem of the juvenile who has been adjudicated delinquent but then absconds before his/her dispositional hearing. See discussion of juvenile absconding at p. 67.

[87] Under circumstances specified in this statute, the sentenced imposed for a violation thereof must be consecutive to the sentence for whatever crime constitutes a violation of lifetime supervision of serious sex offenders. The Committee recommends repeal of this mandatory consecutive sentencing provision just as it has recommended repeal of other mandatory consecutive sentencing provisions. While a consecutive sentence may be desirable in any given case, that decision should be left to the sound discretion of the judge.

[88] Wis. Stat. sec. 940.04(4) is part of the pre-Roe v. Wade statute. The text of the abortion crimes codified in sec. 940.04 dates back to the 1956 revision of the Criminal Code. When the legislature instituted a classification system for Criminal Code felonies and misdemeanors in 1977, it did not classify the crimes in sec. 940.04. 1997 Wisconsin Act 283 charges the Criminal Penalties Study Committee with classifying all felonies. Thus these crimes are now recommended for classification. However, the Committee recommends that the legislature independently study whether sec. 940.04 should be repealed given the fact that post-Roe v. Wade abortion statutes now exist at secs. 940.13 and 940.15.

[89] Wis. Stat. sec. 940.15 is the post-Roe v. Wade abortion statute.

[90] See discussion of the general battery statutes at p. 48.

[91] See discussion of the general battery statutes at p. 48.

CLASS I (18 mo. MAX PRISON; 2 yrs. E.S.) (continued)

Placing Foreign Objects in Edibles	941.325
Tampering with Household Products	941.327(2)(b)1
False Information Concerning Act that Constitutes Tampering with Household Products	941.327(3)
Obstructing Emergency or Medical Personnel with Reasonable Grounds to Believe the Interference May Endanger Another's Safety	941.37(3)
Soliciting a Child to Participate in Criminal Gang Activity	941.38(2)
Criminal Damage to or Graffiti on Religious and Other Property	943.012
Arson of Property other than Building	943.03
Possession of Burglarious Tools	943.12
Theft of Trade Secrets	943.205(3)
Operating Vehicle Without Owner's Consent ("drive or operate")	943.23(3)
Removing Major Part of a Vehicle without Consent	943.23(5)
Transfer of Encumbered Property	943.25(1) and (2)
Possession of Records of Usurious Loans	943.27
Threats to Communicate Derogatory Information	943.31
Certain Financial Transaction Card Crimes	943.41(8)(b) and (c)
Theft of Library Material (> $1000 but < $2500)	943.61(5)(b)
Unlawful Receipt of Payments to Obtain Loan for Another (if value of payment exceeds $500 but does exceed $2500)	943.62(4)(b)
Computer Crime (committed to defraud or obtain property)	943.70(2)(b)2 and (3)(b)2
Unauthorized Release of Animals (3rd or subsequent violation)	943.75(2)
Bigamy	944.05(1)
Adultery	944.16
Unlawful Visual Representations of Nudity	944.205(2)
Commercial Gambling	945.03
Dealing in Gambling Devices	945.05(1)
Permitting Seditious Assembly	946.03(2)
Flag Desecration	946.05(1)
Special Privileges from Public Utilities	946.11(1)
Misconduct in Public Office	946.12
Private Interest in Public Contracts	946.13(1)
Purchasing Claims at Less than Full Value	946.14
Public Construction Contracts at Less than Full Value	946.15(1) & (3)
Failure to Comply with Officer's Attempt to Take Person	946.415(2)
Harboring or Aiding Felons	946.47(1)
Bail Jumping by a Witness	946.49(2)
Destruction of Documents Subject to Subpoena	946.60(1) & (2)

CLASS I (18 mo. MAX PRISON; 2 yrs. E.S.) (continued)

Communicating with Jurors	946.64
Obstructing Justice	946.65(1)
Simulating Legal Process	946.68(1r)(a)
Falsely Assuming to Act as a Public Officer or Employee	946.69(2)
Premature Disclosure of Search Warrant	946.76
Harassment (if person has prior conviction for harassing same victim within last 7 years)	947.013(1t)
Bomb Scares	947.015
Physical Abuse of a Child (recklessly causing bodily harm)	948.03(3)(b)
Exposing a Child to Harmful Material	948.11(2)(a) & (am)
Possession of Child Pornography	948.12
Failure to Support (for 120 or more consecutive days)	948.22(2)
Concealing Death of Child	948.23
Interference with Custody of a Child	948.31(2)
Giving Dangerous Weapon to Person under 18 Years	948.60(2)(b)
Possession of a Dangerous Weapon on School Premises (2nd and subsequent convictions)	948.61(2)(b)
Mistreating an Animal (if mistreatment results in mutilation disfigurement or death of animal or if the animal is police or fire department animal and the animal is injured)	951.18(1)
Exposing a Domestic Animal to Poisonous or Controlled Substances (if animal is a police or fire department animal and the animal is injured)	951.18(1)
Instigating Fights Between Animals (1st offense)	951.18(2)
Harassment of Police or Fire Department Animal and Causing Injury to the Animal	951.18(2m)
Criminal Damage to Property (Aggravated) (from H) (Raise damage amount in (2)(d) from $1000 to $2000)	943.01(2)
Damage or Threat to Property of Witness (from H)	943.011
Criminal Damage; Threat; Property of Judge (from H)	943.013
Criminal Damage; Threat: Property of Dep't of Revenue Employee (from H)	943.015
Graffiti to Certain Property (from H) (Raise damage amount in (2)(d) from $1000 to $2000)	943.017(2)
Graffiti to Property of Witness (from H)	943.017(2m)
Theft of Telecommunications Service [92] (from H)	943.45(3)(d)
Theft of Cellular Telephone Service [93](from H)	943.455(4)(d)

[92] This offense involves theft of telecommunications service for direct or indirect commercial advantage or private financial gain as a 2nd or subsequent offense.

[93] This offense involves theft of cellular telephone service for direct or indirect commercial advantage or private financial gain as a 2nd or subsequent offense.

CLASS I (18 mo. MAX PRISON; 2 yrs. E.S.) (continued)

Theft of Cable Television Service [94] (from H)	943.46(4)(d)
Theft of Satellite Cable Programming [95] (from H)	943.47(3)(d)
Fleeing: Endangering without Property Damage or Bodily Harm(from H)	346.04(3) & 346.17(3)(a)
Stalking (from A misdemeanor)	940.32(2)
Criminal Damage to Railroads (including shooting a firearm at a train) (from A misdemeanor)	943.07(1)& (2)
Possession of Firearm in School Zone (from A misd.)	948.605(2)(a)
Abuse of Vulnerable Adult (intentional maltreatment under circumstances likely to cause bodily harm)	940.285(2)(b)2[96]
Abuse & Neglect of Patients & Residents (intentional abuse or neglect under circumstances likely to cause bodily harm)	940.295(3)(b)2[97]
Abuse & Neglect of Patients & Residents (reckless or negligent abuse or neglect under circumstances likely to cause great bodily harm)	940.295(3)(b)3[98]
Theft (> $2000 but < $5000)	NEW[99]
Receiving Stolen Property (> $2000 but < $5000)	NEW[100]
Fraudulent Use of Financial Transaction Card (> $2000 but < $5000)	NEW[101]
Retail Theft (> $2000 but < $5000)	NEW[102]
Receiving Stolen Property from a Child (> $500 but < $2000)	NEW[103]
Fraud on Hotel or Restaurant Keeper or Taxicab Operator (if value of service > $2000)	NEW[104]
Issuing Worthless Checks (> $2000)	NEW[105]

[94] This offense involves theft of cable television service for direct or indirect commercial advantage or private financial gain as a 2nd or subsequent offense.
[95] This offense involves theft of satellite cable programming for direct or indirect commercial advantage or private financial gain as a 2nd or subsequent offense.
[96] This offense is "new" in the sense that it breaks out intentional maltreatment under circumstances likely to cause bodily harm and classifies it lower than the same conduct that actually causes bodily harm.
[97] This offense is "new" in the sense that it breaks out intentional abuse or neglect under circumstances likely to cause bodily harm and classifies it lower than the same conduct that actually causes bodily harm.
[98] This offense is "new" in the sense that it breaks out reckless or negligent abuse or neglect under circumstances likely to cause great bodily harm and classifies it lower than the same conduct that actually causes great bodily harm.
[99] See footnote to crime of Theft (943.20) in Class G list.
[100] See footnote to crime of Receiving Stolen Property (943.34) in Class G list.
[101] See footnote to crime of Fraudulent Use of Financial Transaction Card (943.41) in Class G list.
[102] See footnote to crime of Retail Theft (943.50) in Class G list.
[103] See footnote to crime of Receiving Stolen Property from a Child (948.62) in Class G list.
[104] The crime of Fraud on Hotel or Restaurant Keeper or Taxicab Operator (943.21) is listed as "new" because the fraud level has been raised from $1000 to $2000 in order for the crime to be classified as a felony. This is consistent with other "value" changes that are recommended.

CLASS I (18 mo. MAX PRISON; 2 yrs. E.S.) (continued)

Removing or Damaging Encumbered Real Property (if security is impaired by > $2000)	NEW[106]
Fraudulent Insurance or Employee Benefit Claim (>$2000)	NEW[107]
Absconding after being adjudicated delinquent for a Class I felony	NEW[108]
Solicitation to Commit a Class I Felony	939.30(2) (amendment)

[105]The crime of Issue of Worthless Check (943.24) is listed as "new" because the value level has been raised from $1000 to $2000 in order for the crime to be classified as a felony. This is consistent with other "value" changes that are recommended.

[106]The crime of Removing or Damaging Encumbered Real Property (943.26) is listed as "new" because the value of the security impaired has been raised from $1000 to $2000. This is consistent with other "value" changes that are recommended.

[107]The crime of Fraudulent Insurance or Employee Benefit Claim (943.395) is listed as "new" because the fraud level has been raised from $1000 to $2000. This is consistent with other "value" changes that are recommended.

[108] This crime appears in each of the felony classes. It addresses the problem of the juvenile who has been adjudicated delinquent but then absconds before his/her dispositional hearing. See discussion of juvenile absconding at p. 67.

CLASS A MISDEMEANOR (9 MOS. MAX JAIL)

THE MISDEMEANORS LISTED BELOW INCLUDE NEWLY PROPOSED OFFENSES (IN BLUE), FORMER FELONIES (IN RED) AND ONE FORMER CLASS B MISDEMEANOR (IN GREEN). THE REMAINDER OF CLASS A MISDEMEANORS ARE ANALYZED IN PART II-E BELOW.

Theft of Telecommunications Service (from I felony)	943.45(3)(c)
Theft of Cellular Telephone Service (from I felony)	943.455(4)(c)
Theft of Cable Television Service (from I felony)	943.46(4)(c)
Theft of Satellite Cable Programming (from I felony)	943.47(3)(c)
Carrying Firearm in Public Building (from B misdemeanor)	941.235(1)
Theft (< $2000)	NEW[109]
Receiving Stolen Property (< $2000)	NEW[110]
Fraudulent Use of Financial Transaction Card (< $2000)	NEW[111]
Retail Theft (< $2000)	NEW[112]
Receiving Stolen Property from a Child (< $500)	NEW[113]
Fraud on Hotel or Restaurant Keeper or Taxicab Operator (< $2000)	NEW[114]
Issuing Worthless Checks (< $2000)	NEW[115]
Removing or Damaging Encumbered Real Property (if security is impaired by < $2000)	NEW[116]
Fraudulent Insurance or Employee Benefit Claim (< $2000)	NEW[117]
Demolition of Historic Building without Authorization	NEW[118]
Operating Vehicle Without Owner's Consent (new misdemeanor version)	NEW[119]
Fleeing an Officer (new misdemeanor version)	NEW[120]

[109] See footnote to crime of Theft (943.20) in the Class G list.
[110] See footnote to crime of Receiving Stolen Property (943.34) in the Class G list.
[111] See footnote to crime of Fraudulent Use of Financial Transaction Card (943.41) in the Class G list.
[112] See footnote to crime of Retail Theft (943.50) in Class G list.
[113] See footnote to crime of Receiving Stolen Property from a Child (948.62) in the Class G list.
[114] See footnote to crime of Fraud on Hotel or Restaurant Keeper or Taxicab Operator (943.21) in the Class I list.
[115] See footnote to crime of Issue of Worthless Checks (943.24) in the Class I list.
[116] See footnote to crime of Removing or Damaging Encumbered Real Property (943.26) in the Class I list.
[117] See footnote to crime of Fraudulent Insurance or Employee Benefit Claim in the Class I list.
[118] This crime is presently codified at sec. 943.014 but is not classified. Its penalty is currently imprisonment for not more than 9 months. The committee recommends classifying this offense as a Class A misdemeanor.
[119] The Committee recommends the creation of a misdemeanor version of the operating vehicle without owner's consent offense to supplement the felonies that exist under current law. A discussion of the proposal is included in the text of this report.
[120] The Committee recommends the creation of a misdemeanor version of the fleeing an officer offense to supplement the fleeing felonies that exist under current law. A discussion of the proposal is included in the text of this report at p. 56.

3. Attributes of the New Felony Classes

When the crimes which have been assigned to the nine new felony classes are examined, several observations may be made about the kinds of crimes in each class and the way in which offenses cascade through the classes on the basis of severity.

Felony Class A is reserved for the most serious crimes against life and the state. Class B is restricted to the gravest of violent offenses against the person (other than those in Class A). In Class C most of the crimes involve violence against the person or the potential for grave harm to persons (for example, armed robbery, carjacking and arson of buildings); this class is also utilized for the most serious of drug offenses (which are classified later in this report). Classes D, E and F contain primarily offenses against the person that involve either lesser harms (or lesser potential for harm) or less culpable mental states than the felonies in the higher classes. Class G is somewhat transitional in that it contains numerous offenses against persons and their safety but also picks up some serious property offenses. Classes H and I are utilized for less serious offenses against the person and for the great majority of property crimes and crimes against government and its administration (most of which are already classified among the less serious felonies).

4. Recommendations Regarding New Statutes, Amendments to Existing Statutes, and the Repeal of Certain Statutes

a. Homicide. The Committee carefully scrutinized Wisconsin's homicide statutes to determine their proper placement in the new A-I felony classification system. Because the result is the same in each of these crimes, the legislature has generally classified them according to mental state. The Committee has maintained this approach in making its classification recommendations.

Of course first-degree intentional homicide[121] is retained as a Class A felony for which the penalty is life imprisonment.

First-degree reckless homicide[122] and second-degree intentional homicide[123] are both recommended for classification as B felonies. Under present law these offenses are both punishable by up to 40 years in prison and thus would naturally convert to Class C

[121] Wis. Stat. sec. 940.01(1).

[122] Wis. Stat. sec. 940.02(1) (recklessly causing the death of another human being under circumstances that show utter disregard for human life and 940.02(1m) (recklessly causing the death of an unborn child under circumstances that show utter disregard for the life of that unborn child). The recommendation discussed in the text accompanying this note does not deal with the form of first-degree reckless homicide which involves the death of someone following the delivery of a controlled substance (the so-called "Len Bias" law). See Wis. Stat. sec. 940.02(2). This offense is classified as a Class C felony in the Committee's proposal.

[123] Wis. Stat. sec. 940.05. Second-degree intentional homicide is first-degree intentional homicide mitigated by imperfect self-defense, adequate provocation, coercion, necessity, or unreasonable prevention of a felony. See Wis. Stat. sec. 940.01(2).

felonies when the mandatory release converter is applied to transfer them to the new A-I classification system. Both the Code Reclassification Subcommittee and the Criminal Penalties Study Committee as a whole debated[124] whether these two homicides should be placed in the same class[125] and whether that class should be Class B or Class C. The Committee ultimately concluded that placement in the same class should be maintained because that placement was the result of intricate revisions of the law of homicide as a whole that took place over a decade ago and because splitting these offenses into separate classes would undesirably upset the balance that was struck at that time. Further, after considering the seriousness of these offenses, the factual contexts in which they arise, and the kinds of other offenses that have been placed in the B and C classes, the Committee concluded that first-degree reckless homicide and second-degree reckless homicide should be classified as B felonies.

The Committee recommends that the crime of homicide by intoxicated use of a vehicle be split into two felony classes depending upon the offender's record of impaired driving offenses. Under current law this crime is punishable by up to 40 years in prison[126] and would thus naturally convert to a Class C felony in the new A-I classification system. But when compared with other homicides, placement in Class C appears to be one class too high. The offense has no mental state element and it is thus difficult to place in the cascade of other homicide offenses which have a mental state element. However, the Committee concluded that homicide by the intoxicated use of a vehicle is most closely akin to second-degree reckless homicide. In its view driving in a state of impairment is the rough equivalent of the conscious risk taking associated with the crime of reckless homicide. The latter is recommended for placement in Class D and thus the Committee recommends that homicide by intoxicated use of a vehicle be placed in that classification as well. For both the maximum term of confinement for one count[127] would thus be 15 years (which in the world of Truth-in-Sentencing means 15 years of real time not subject to parole or other forms of early release) followed by a maximum period of extended supervision in the amount of 10 years. However, if the defendant has a prior conviction for an impaired driving offense,[128] then the offense is

[124] Valuable assistance in this debate was provided by appellate lawyers from both the Wisconsin Department of Justice and the Wisconsin State Public Defender's Office.

[125] Until the Wisconsin homicide laws were revised in 1989 (see 1987 Wis. Act 399), second-degree murder (the equivalent of what is now first-degree reckless homicide) was punished more severely than manslaughter (the rough equivalent of what is now second-degree intentional homicide). See Wis. Stat. secs. 940.02 and 940.05 (1985-86).

[126] The history of punishing homicide by the intoxicated use of a vehicle in Wisconsin reveals a consistent pattern of escalating the severity of this offense. When this state first undertook the process of crime classification in 1978, the offense was punished as a Class D felony for which the maximum imprisonment was five years. See Wis. Stat. sec. 940.09 (1977). Since then its classification has been upgraded several times to the point where it is now classified as a Class B felony for which the maximum imprisonment is 40 years. This is doubtless the result of the great tragedy which accompanies the commission of this crime and the high visibility with which violations are publicly reported.

[127] The Wisconsin Supreme Court has concluded that a separate count of homicide by intoxicated use of a vehicle may be prosecuted for each death caused by the defendant's act of driving in an impaired state. See State v. Rabe, 96 Wis. 2d 48, 291 N.W.2d 809 (1980).

[128] Prior convictions are determined by application of the "counting statute" codified at Wis. Stat. sec. 343.307(2).

graded as a Class C felony for which the maximum term of confinement is 25 years followed by a maximum period of extended supervision in the amount of 15 years.[129] The Committee believes that these classifications meet the legislative charge to classify crimes of like severity in the same class while at the same time providing sufficient real-time punishment for those who drive while impaired and take human life in the process of doing so.

The remaining homicides and other serious injury offenses are classified according to harm and mental state. They are depicted on the chart which follows. Only Classes A through G are used in the chart because homicides and other serious injury offenses are all classified at the G level or above. Commentary following the chart explains how harm and mental state compare for some of the more commonly prosecuted homicides and serious injury offenses.

[129] It is the intent of the Committee that in prosecutions for the Class C felony version of homicide by intoxicated use of a vehicle, the existence of the prior impaired driving offense be an element of the crime.

DEPICTION OF HOMICIDES & SERIOUS INJURY FELONIES

GBH = GREAT BODILY HARM *LGBH = LIKELIHOOD OF GREAT BODILY HARM*

A	B	C	D	E	F	G
1st Degree Intentional Homicide						
Partial-Birth Abortion	1st Degree Reckless Homicide					
	2nd Degree Intentional Homicide	Len Bias Homicide (Drugs)				
	Attempted 1st Deg. Int. Homicide		2nd Degree Reckless Homicide			
		Int/Reck Abuse of Vul. Adult: Death	1st Degree Reckless Injury			
		Int/Reck Abuse of Patients/Res: Death	Neg. Abuse of Vul. Adult: Death		2nd Degree Reckless Injury	
			Neg. Abuse of Patients/ Res: Death		1st Degree Reck.Endan. Safety	
		Tamper w/ Household Prod: Death	Child Neglect: Death		Abuse of Vul. Adult: GBH	2nd Degree Reck.Endan. Safety
	1st Degree Sexual Assault	OWI Homicide Repeater[130]		Abuse of Patients/Res: GBH[131]	Abuse of Patients/Res: GBH	Int.Abuse of Vul.Adult: LGBH
	1st Degree Sex Assault of a Child	Mayhem	OWI Homicide[132]		Tamper w/ Household Prod: GBH	Int.Abuse of Patients/Res: LGBH
		2nd Degree Sexual Assault	Homicide: Intox. Use Of Firearm	Aggravated Battery (int. cause GBH)		Hazing: Death
		2nd Degree Sex Assault of a Child		Child Abuse (int. causing GBH)		Homicide: Neg Use of Weapon
				Fleeing: Death	Injury by OWI	Homicide: Neg. Use of Vehicle
			3rd Degree Sex Assault	Obstruct Rescue Pers: Death	Fleeing: Causing GBH	Homicide: Neg. Control of Animal

[130] OWI Repeater = 1 or more prior impaired driving convictions as counted under Wis. Stat. sec. 343.307(2).
[131] Victim must be a "vulnerable adult."
[132] OWI Homicide with no impaired driving convictions as determined by application of Wis. Stat. sec. 343.307(2).

DEPICTION OF HOMICIDES AND SERIOUS INJURY FELONIES (continued)

CLASS	CRIME	RESULT	MENS REA
A	1ST Degree Int. Homicide	Death	Intent
A	Partial-Birth Abortion	Death	Intent
B	1st Degree Reckless Homicide	Death	Aggravated Recklessness
B	2nd Degree Int. Homicide	Death	Mitigated Intent
C	OWI Homicide – Repeater	Death	Akin to Reckless[133]
D	Child Neglect: Death	Death	Intent: Contr. To Neglect of Child Strict Liab: Death
D	2nd Degree Reckless Homicide	Death	Recklessness
D	OWI Homicide	Death	Akin to Reckless[134]
D	1st Degree Reckless Injury	Great Bodily Harm	Aggravated Recklessness[135]
E	Aggravated Battery	Great Bodily Harm	Intent
F	2nd Degree Reckless Injury	Great Bodily Harm	Recklessness
F	Injury by OWI	Great Bodily Harm	Akin to Reckless[136]
F	1st Degree Reck. Endan. Safety	Endanger Safety	Aggravated Recklessness
G	2nd Degree Reck. Endan. Safety	Endanger Safety	Recklessness
G	Homicide: Neg. Use of Weapon	Death	Crim. Negligence
G	Homicide: Neg. Use of Veh.	Death	Crim. Negligence

[133] OWI Homicide – Repeater is graded at the C level because defendant has prior impaired driving conviction as determined by application of Wis. Stat. sec. 343.307(2).

[134] Though the OWI homicide statute contains no mens rea, the committee concluded that driving a vehicle while under the influence of intoxicants (and/or other specified substances) represents the rough equivalent of the conscious risk taking associated with the crime of reckless homicide.

[135] Aggravated recklessness involves taking a conscious risk of causing death or great bodily harm. Thus 1st degree reckless injury is graded higher than aggravated battery which involves the same harm but involves a mental purpose to cause great bodily harm – not death.

[136] Though the OWI injury statute contains no mens rea, the committee concluded that driving a vehicle while under the influence of intoxicants (and/or other specified substances) represents the rough equivalent of the conscious risk taking associated with the crime of 2nd degree reckless injury.

b. Battery. The Wisconsin general battery statute is codified at Wis. Stat. sec. 940.19. A companion statute protecting the unborn from similar harms is codified in sec. 940.195. Beyond these general battery statutes, the Criminal Code contains a whole host of special circumstance batteries, offering protection to various groups by way of the greater penalties that attend these offenses. The list is long and includes such groups as law enforcement officers, firefighters, judges, witnesses, jurors, public officers, employees and visitors to prisons, employees of technical colleges and school districts, public transit drivers and passengers, employees of the Department of Revenue, employees of the Department of Workforce Development, etc. In some instances the protections of the special circumstance batteries are also extended to family members.

Proposed Revision of General Battery Statutes

When the State of Wisconsin last undertook a comprehensive revision of its criminal laws in the 1950's, the legislature addressed the crime of battery with two simple and straightforward statutes. The misdemeanor version of the crime prohibited the "caus[ing of] of bodily harm to another by an act done with intent to cause bodily harm to that person or another."[137] The felony version, known as "aggravated battery," prohibited "intentionally caus[ing] great bodily harm to another."[138]

Since 1955 the legislature has made numerous additions to the general battery statute, creating several intermediate levels of the offense by mixing and matching harms and mental states. The result is a relatively confusing set of crimes about which the Committee heard several complaints from both within and without. At present the statute reads as follows:

> (1) Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor.
>
> (2) Whoever causes substantial bodily harm to another by an act done with intent to cause bodily harm to that person or another is guilty of a Class E felony.
>
> (3) Whoever causes substantial bodily harm to another by an act done with intent to cause substantial bodily harm to that person or another is guilty of a Class D felony.
>
> (4) Whoever causes great bodily harm to another by an act done with intent to cause bodily harm to that person or another is guilty of a Class D felony.

[137] Wis. Stat. sec. 940.20 (1955).
[138] Wis. Stat. sec. 940.22 (1955). The 1955 aggravated battery statute was augmented by the mayhem statute which remains a part of the Criminal Code to this day. See Wis. Stat. sec. 940.21.

(5) Whoever causes great bodily harm to another by an act done with intent to cause either substantial bodily harm or great bodily harm to that person or another is guilty of a Class C felony.

(6) Whoever intentionally causes bodily harm to another by conduct that creates a substantial risk of great bodily harm is guilty of a Class D felony. A rebuttable presumption of conduct creating a substantial risk of great bodily harm arises:

(a) If the person harmed is 62 years of age or older; or

(b) If the person harmed has a physical disability, whether congenital or acquired by accident, injury or disease, that is discernible by an ordinary person viewing the physically disabled person, or that is actually known by the actor.

After careful review of the statute, the Committee proposes a revision which is designed to return simplicity and straightforwardness to the law of battery and which the Committee believes addresses the several concerns expressed about it. Preserved are traditional forms of misdemeanor battery (causing bodily harm with intent to cause bodily harm) and felony aggravated battery (causing great bodily harm with intent to cause great bodily harm). Also maintained are intermediate offenses of causing great bodily harm[139] or substantial bodily harm[140] by an act done with intent to cause bodily harm. Finally, the special provisions protecting those 62 years of age or older and those with a physical disability are preserved without change.

The proposed statute reads as follows:

940.19 Battery. (1) Whoever causes great bodily harm to another by an act done with intent to cause great bodily harm to that person or another is guilty of a Class E felony.[141]

(2) Whoever causes great bodily harm to another by an act done with intent to cause bodily harm to that person or another is guilty of a Class H felony.[142]

[139] Wis. Stat. sec. 939.22(14) defines "great bodily harm" as "bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss of impairment of the function of any bodily member or organ or other serious bodily injury."
[140] Wis. Stat. sec. 939.22(38) defines "substantial bodily harm" as "bodily injury that causes a laceration that requires stitches; any fracture of a bone; a burn; a temporary loss of consciousness, sight or hearing; a concussion; or a loss or fracture of a tooth."
[141] Subsection 1 is derived from sec. 940.19 (5) (traditional aggravated battery) but limits this offense to the situation where the actor causes great bodily harm and intends this level of harm.
[142] Subsection 2 is the current sec. 940.19 (4).

(3) Whoever causes substantial bodily harm to another by an act done with intent to cause bodily harm to that person or another is guilty of a Class I felony.[143]

(4) Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor.[144]

(5) Whoever intentionally causes bodily harm to another by conduct that creates a substantial risk of great bodily harm is guilty of a Class H felony. A rebuttable presumption of conduct creating a substantial risk of great bodily harm arises:

(a) If the person harmed is 62 years of age or older; or

(b) If the person harmed has a physical disability, whether congenital or acquired by accident, injury or disease, that is discernible by an ordinary person viewing the physically disabled person, or that is actually known by the actor.[145]

Using mental state and harm actually caused, the following chart depicts the relationship of the four principal offenses as they appear in subsections 1 through 4 of the proposed statute:

OFFENSE CLASS	INTENT	HARM CAUSED
Class E felony	Intent to Cause Great Bodily Harm	Great Bodily Harm
Class H felony	Intent to Cause Bodily Harm	Great Bodily Harm
Class I felony	Intent to Cause Bodily Harm	Substantial Bodily Harm
Class A misdemeanor	Intent to Cause Bodily Harm	Bodily Harm

[143] Subsection 3 is the current sec. 940.19 (2).
[144] Subsection 4 is the current 940.19(1) (traditional misdemeanor battery).
[145] Subsection 5 preserves Wis. Stat. sec. 940.19(6) without change.

An understandable complaint about current law is that it is difficult to craft jury instructions when the court determines that the jury should be given the option of finding the defendant guilty of a lesser included battery offense.[146] The proposed four-tiered structure of crimes should simplify this part of the trial considerably. Examples:

- If the defendant is charged with the E felony but there is some dispute in the evidence as to whether the actor harbored the intent to cause great bodily harm but no dispute that great bodily harm was inflicted, the H felony (subsection 2) should be given to the jury as an option.

- If the defendant is charged with the E felony but there is some dispute in the evidence as to whether great bodily harm was inflicted but no dispute that the actor harbored the intent, the jury should be given the option of finding the defendant guilty of an attempt to commit the E felony.

- If the defendant is charged with the E felony but there is some dispute both as to whether the actor harbored the intent to cause great bodily harm and whether great bodily harm was inflicted, the jury should be given the option of finding the defendant guilty of either the I felony or the A misdemeanor (according to the evidence re: harm inflicted).

- If the defendant is charged with the H felony (subsection 2) but there is some dispute as to whether great bodily harm was inflicted, the jury should be given the option of finding the defendant guilty of either the I felony or the A misdemeanor (according to the evidence re: harm inflicted).

- If the defendant is charged with the I felony but there is some dispute as to whether substantial bodily harm was inflicted, the jury should be given the option of the finding the defendant guilty of the A misdemeanor.

The Committee believes that the range of variations involving harms and mental states that may realistically occur are comprehensively addressed by the proposed statute. It also notes that there are several other statutes which address related behavior, including the following:

[146] Wis. Stat. sec. 939.66 provides that an included crime may be any of the following: "(2) A crime which is a less serious or equally serious type of battery than the one charged." The statute presents the anomaly of one crime being "included" within another when they have the same penalty.

First-degree Reckless Injury – Wis. Stat. sec. 940.23(1)
Second-degree Reckless Injury – Wis. Stat. sec. 940.23(2)
First-degree Recklessly Endangering Safety – Wis. Stat. sec. 941.30(1)
Second-degree Recklessly Endangering Safety – Wis. Stat. sec. 940.30(2)
Mayhem – Wis. Stat. sec. 940.21

A recent addition to the compendium of battery laws is the statute entitled **Battery to an Unborn Child; Substantial Battery to an Unborn Child; Aggravated Battery to an Unborn Child.**[147] This statute is codified at Wis. Stat. sec. 940.195 and currently provides as follows:

> (1) Whoever causes bodily harm to an unborn child by an act done with intent to cause bodily harm to that unborn child, to the woman who is pregnant with that unborn child or another is guilty of a Class A misdemeanor.
>
> (2) Whoever causes substantial bodily harm to an unborn child by an act done with intent to cause bodily harm to that unborn child, to the woman who is pregnant with that unborn child or another is guilty of a Class E felony.
>
> (3) Whoever causes substantial bodily harm to an unborn child by an act done with intent to cause substantial bodily harm to that unborn child, to the woman who is pregnant with that unborn child or another is guilty of a Class D felony.
>
> (4) Whoever causes great bodily harm to an unborn child by an act done with intent to cause bodily harm to that unborn child, to the woman who is pregnant with that unborn child or another is guilty of a Class D felony.
>
> (5) Whoever causes great bodily harm to an unborn child by an act done with intent to cause either substantial bodily harm or great bodily harm to that unborn child, to the woman who is pregnant with that unborn child or another is guilty of a Class C felony.
>
> (6) Whoever intentionally causes bodily harm to an unborn child by conduct that creates a substantial risk of great bodily harm is guilty of a Class D felony.

[147] This statute was created by 1997 Wis. Act 295.

The Committee has reviewed this statute as well and recommends that it be repealed and recreated to read as follows:

> **940.195 Battery to an Unborn Child.** (1) Whoever causes great bodily harm to an unborn child by an act done with intent to cause great bodily harm to that unborn child, to the woman who is pregnant with that unborn child or another is guilty of a Class E felony.
>
> (2) Whoever causes great bodily harm to an unborn child by an act done with intent to cause bodily harm to that unborn child, to the woman who is pregnant with that unborn child or another is guilty of a Class H felony.
>
> (3) Whoever causes substantial bodily harm to an unborn child by an act done with intent to cause bodily harm to that unborn child, to the woman who is pregnant with that unborn child or another is guilty of a Class I felony.
>
> (4) Whoever causes bodily harm to an unborn child by an act done with intent to cause bodily harm to that unborn child, to the woman who is pregnant with that unborn child or another is guilty of a Class A misdemeanor.

The provisions of proposed sec. 940.195 track the first four subsections of proposed sec. 940.19. The same commentary to sec. 940.19 would be applicable here as well.

c. Abuse of Vulnerable Adults, Abuse and Neglect of Patients and Residents, Physical Abuse of a Child, Neglecting a Child, Causing Mental Harm to a Child, Tampering with Household Products, <u>etc</u>. The Wisconsin Statutes contain numerous offenses in the categories of crime listed in the title to this section. In many of these categories there are several offenses which mix and match harm, potential for harm, and culpability or mental state. The Committee attempted to bring some uniformity to the treatment of these offenses and recommends the classification system depicted on the chart which follows. Its rationale for the classifications suggested and for proposed changes to the statutes is discussed in the footnotes which accompany the chart.

DEPICTION OF MISCELLANEOUS INJURY OFFENSES IN THE A-I SYSTEM

AVA = ABUSE OF VULNERABLE ADULTS (940.285)
APF = ABUSE OF RESIDENTS OF PENAL FACILITIES (940.29)
APR = ABUSE AND NEGLECT OF PATIENTS AND RESIDENTS (940.295)
THP = TAMPERING WITH HOUSEHOLD PRODUCTS (941.327)
PAC = PHYSICAL ABUSE OF A CHILD (948.03)[148]
MHC = CAUSING MENTAL HARM TO A CHILD (948.04)
CN = NEGLECTING A CHILD (948.21)

MENS REA ("MR"): I = Intentionally R = Recklessly N = Negligently

HARMS ("H") GBH = Great Bodily Harm BH = Bodily Harm
LGBH = Likely to Cause GBH LBH = Likely to Cause BH
HPGBH = High Probability of Great Bodily Harm SBH = Substantial Bodily Harm

A	B	C	D	E	F	G	H	I
		AVA MR:I R H: Death	AVA MR: N H: Death		AVA MR:I R N H: GBH	AVA MR: I H: LGBH	AVA MR: I H: BH[149]	AVA MR: I H: LBH
								AVA MR: R N H: LGBH
								APF
		APR MR:I R H: Death[150]	APR MR: N H: Death[151]	APR MR:I R N H: GBH[152]	APR MR: I H:GBH[153]	APR MR: I H: LGBH	APR MR: I H: BH[154]	APR MR: I H: LBH
							APR MR: R N H: GBH[155]	APR MR: R N H: LGBH
		THP H: Death			THP H: GBH		THP HPGBH	THP General

[148] See also Wis. Stat. sec. 948.03(4) re: Failing to Act to Prevent Bodily Harm.
[149] This proposal calls for classifying what is currently sec. 940.285(2)(b)2 as an H felony when bodily harm is actually caused and as an I felony when there is only a likelihood of bodily harm. Under present law these two offenses are both classified as an E felony.
[150] Victim must be a "vulnerable person."
[151] Victim must be a "vulnerable person."
[152] Victim must be a "vulnerable person." This is the justification for classifying this offense at the E level.
[153] This proposal calls for classifying what is currently sec. 940.295(3)(b)1r as a F felony when great bodily harm is actually caused and as an I felony when there is only a likelihood of great bodily harm. Under present law these two offenses are both classified as a D felony.
[154] This proposal calls for classifying what is currently sec. 940.295(3)(b)2 as an H felony when bodily harm is actually caused and as an I felony when there is only a likelihood of bodily harm. Under present law these two offenses are both classified as an E felony.
[155] This proposal calls for classifying what is currently sec. 940.295(3)(b)3 as an H felony when great bodily harm is actually caused and as an I felony when there is only a likelihood of great bodily harm. Under present law these two offenses are both classified as an E felony.

A	B	C	D	E	F	G	H	I
				PAC MR: I H: GBH			PAC MR: I H: BH	PAC MR: R H: BH
					PAC MR: I [156] H: BH [157]	PAC MR: R[158] H: GBH		
							PAC MR: R H: BH [159]	
					MHC			
			CN H: Death					
				Agg. Battery[160] MR: I: GBH H: GBH			Int. Battery[161] MR: I: BH H: GBH	Int. Battery[162] MR: I: BH H: SBH

[156] The intent here must be to cause bodily harm.
[157] The conduct here must be such as to create a high probability of great bodily harm.
[158] The recklessness element of this offense involves creating a situation of unreasonable risk of harm to and demonstrates a conscious disregard for the safety of the child. It is less serious than the ordinary definition of recklessness found in sec. 939.24 which involves consciously creating an unreasonable and substantial risk of death or great bodily harm to another. Thus the offense to which this footnote is attached is graded less seriously than 2nd degree reckless injury (940.23(2)).
[159] The conduct here must be such as to create a high probability of great bodily harm.
[160] See proposed amendment to general battery statute at p. 48.
[161] See proposed amendment to general battery statute at p. 48.
[162] See proposed amendment to general battery statute at p. 48.

d. Fleeing an Officer. Under present law fleeing an officer[163] is a felony offense. It is codified in the Motor Vehicle Code and has a graduated penalty structure as follows:[164]

HARM	IMPRISONMENT	FINE
No Bodily Harm; No Property Damage	2 years	$ 10,000
Bodily Harm or Damage to Property of Another	2 years	$ 1000 - $ 10,000
Great Bodily Harm	2 years	$1100 - $ 10,000
Death	5 years	$1100 - $10,000

The Committee notes several problems with this structure of penalties. First, the maximum term of imprisonment is the same (2 years) regardless of whether the harm caused by the act of fleeing is no bodily harm, bodily harm or great bodily harm. The term of imprisonment increases only if death is caused. Further, the only distinction between the penalty for an act of eluding that causes bodily harm and one that causes great bodily harm is a $ 100 difference in the minimum fine.

The Committee recommends that the penalty structure for fleeing be revamped such that the terms of maximum possible imprisonment are graduated according to the level of harm caused by the actor. This would bring fleeing into line with a number of other crimes whose penalties are likewise staggered according to harm.

[163] Wis. Stat. sec. 346.04(3).

[164] The penalties depicted in the chart accompanying this note are those established by the legislature prior to 1997 Wis. Act 283. See Wis. Stat. sec. 346.17(3)(a)-(d).

Using the A-I felony classification system the Committee recommends the following classifications for fleeing offenses:

HARM	FELONY CLASS	MAXIMUM TERM OF INCARCERATION	MAXIMUM TERM OF EXTENDED SUPERVISION	MAXIMUM FINE
No Bodily Harm; No Property Damage	I	18 months	2 years	$ 10,000
Bodily Harm or Damage to Property of Another	H	3 years	3 years	$ 10,000
Great Bodily Harm to Another	F	7.5 years	5 years	$ 25,000
Death Of Another	E	10 years	5 years	$ 50,000

The Committee further recommends that a **misdemeanor** fleeing offense be restored to Wisconsin law. Until 1994 an act of fleeing that did not result in injury or property damage was a misdemeanor offense.[165] In that year the misdemeanor was elevated to a 2-year felony.[166] Doubtless this occurred because some fleeing episodes, though not resulting in injury or property damage, nonetheless pose great threats to the safety of officers and others and thus deserve felony treatment.

However, the Committee learned that the total absence of a misdemeanor fleeing offense has caused an undesirable gap in the motor vehicle laws. Some episodes are short, don't involve high speed, do not seriously compromise public safety, etc. Some prosecutors are hesitant to pursue these cases as felonies and look for ways to resolve them other than at the felony level, sometimes resorting to non-traffic offenses like resisting an officer. Some judges, too, have expressed dissatisfaction with adjudication at the felony level when the actor's conduct, though technically in violation of the statute, is relatively minor in nature.

The Committee believes that a misdemeanor fleeing offense should be incorporated into the fleeing statute for use in those cases when the defendant's behavior is appropriately addressed with a conviction other than at the felony level. The

[165] Wis. Stat. secs. 346.04(3) and 346.17(3)(a) (1991-92).
[166] See 1993 Wis. Act 189.

Committee further believes that the misdemeanor should be part of the motor vehicle laws so that a conviction is properly entered upon the actor's driving record and can appropriately affect the actor's driving privilege. The latter does not occur if a minor offense is pleaded out to a non-traffic offense like resisting an officer.

The Committee searched for the most desirable way of describing the misdemeanor offense. It recommends the following:

> **No operator of a vehicle, after having received a visual or audible signal to stop his or her vehicle from a traffic officer, or marked police vehicle, shall knowingly resist the traffic officer by failing to stop his or her vehicle as promptly as safety reasonably permits.**

As proposed, the misdemeanor would not be a lesser included offense of the felony because it has elements in addition to the elements of the felony, i.e., a mental state of "intentionally" and an actus reus element of "resists." Neither of these is an element of felony fleeing.

The statute should preclude an offender from being convicted of both the misdemeanor and the felony for the same act of fleeing. As a practical matter, the Committee expects that the misdemeanor will probably be used most often – not as a charge to be tried – but as a way of resolving minor fleeing cases by way of a guilty plea. Nonetheless, in appropriate cases, the prosecutor may elect to proceed from the outset with the misdemeanor.

This offense should be punishable by fine or imprisonment or both. The Committee recommends penalties at the Class A misdemeanor level, which would involve a 9-month maximum term of imprisonment or a $10,000 fine, or both.

e. Habitual Criminality. The Committee recommends that the penalty section of the general repeater statute[167] (also known as habitual criminality) be amended to read as follows:

> 939.62 (1) If the actor is a repeater, as that term is defined in sub. (2), and the present conviction is for any crime for which imprisonment may be imposed (except for an escape under s. 946.42 or a failure to report under s. 946.425) the maximum term of imprisonment prescribed by law for that crime may be increased as follows:
>
> (a) A maximum term of one year or less may be increased to not more than ~~3~~ 2 years.

[167] Wis. Stat. sec. 939.62(1).

(b) A maximum term of more than one year but not more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than ~~6~~ 4 years if the prior conviction was for a felony.

(c) A maximum term of more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than ~~10~~ 6 years if the prior conviction was for a felony.

The Committee arrived at these changes by applying the mandatory release converter (which it used to convert felonies from their existing felony classes into the new A-I classification system) to arrive at the numbers recommended above. It does not recommend reducing the provisions for the 2-year increases specified in (b) and (c) which apply when the person is a habitual criminal because of prior misdemeanor convictions.

The Committee recommends no changes for the persistent repeater ("three strikes" and "two strikes") provisions of the habitual criminality statute.[168]

f. Penalty Enhancers. The last recodification of the Wisconsin Criminal Code occurred in the early 1950's.[169] At that time Chapter 939 had a habitual criminality provision but no other enhancers. Concealing identity during the commission of a crime was treated as a separate crime[170] and a few substantive crimes had aggravating circumstances built into them which elevated the severity of the offense.[171]

Since that time the enactment of penalty enhancers has become extremely popular with the Wisconsin legislature (and legislatures nationally). Today Chapter 939 by itself has at least 17 enhancer statutes and that number may reasonably be expected to rise. In addition to the Chapter 939 enhancers, numerous substantive crimes have enhancers and penalty doublers built into them. Further, the legislature has passed a significant number of special circumstances crimes which really amount to enhancers in the sense that they consist of ordinary crimes whose protections have been extended to special groups with concomitant increases in penalties.[172]

With the advent of Truth-in-Sentencing, the Committee considered whether some penalty enhancers (but not all of them) might be incorporated into an omnibus statute identifying aggravating circumstances which the judge must consider at sentencing. An aggravating circumstance may drive the judge to impose a heavier sentence but it does not affect the maximum possible sentence. In making the recommendations which

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[168] See Wis. Stat. sec. 939.62(2m).
[169] See 1955 Wis. Laws 696.
[170] See Wis. Stat. sec. 946.62 (1955).
[171] See, e.g, Criminal Damage to Property (Wis. Stat. sec. 943.01(2)(1955)) and Burglary (Wis. Stat. sec. 943.10(2)(1955)).
[172] The numerous special circumstances battery statutes codified in Wis. Stat. ch. 940 are perhaps the best examples of ordinary crimes whose protections have been extended to special groups.

follow for the recharacterization of certain enhancers as sentencing aggravators, the Committee determined that the amount of real incarceration time available to the judge in the proposed A-I classification system leaves enough room for appropriately dealing with the offender who has committed most "aggravated" forms of the underlying offense. It also considered the extent to which the enhancers are actually utilized, the impact of enhancers on the maximum term of imprisonment, and the experience of other states which have enacted Truth-in-Sentencing and which have recast penalty enhancers as sentencing aggravators.

The Committee recommends that the following Chapter 939 statutes be maintained as penalty enhancers without change in the amount by which the maximum term of imprisonment may be increased:[173]

- Wis. Stat. sec. 939.63 Penalties; Use of a Dangerous Weapon
- Wis. Stat. sec. 939.632 Penalties; Violent Crime in a School Zone
- Wis. Stat. sec. 939.621 Increased Penalty for Certain Domestic Abuse Offenses
- Wis. Stat. sec. 939.645 "Hate Crimes"

If pleaded and proved, these enhancers increase the maximum term of confinement for the underlying crime and increase the overall maximum term of imprisonment as well.[174] They do not lengthen the maximum term of extended supervision for the underlying crime. Returning to an example used earlier, suppose that one has been convicted of the crime of assault by a prisoner[175] while armed with a dangerous weapon. The Committee recommends that the base offense be classified as a Class F felony, which carries a maximum term of confinement of 7.5 years and a maximum term of extended supervision of 5 years for a total maximum term of imprisonment in the amount of 12.5 years. The dangerous weapon penalty enhancer adds 5 years to the maximum term of confinement for the underlying assault charge while likewise increasing the overall maximum term of imprisonment by the same amount. It does not increase the maximum term of extended supervision. Therefore, the judge could sentence the offender to a maximum term of confinement in the amount of 12.5 years followed by a maximum term of extended supervision in the amount of 5 years.

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[173] Drug law enhancers which the Committee recommends maintaining are discussed at p. 79.

[174] See Wis. Stat. sec. 971.01(2)(c). In some instances the defendant will be convicted of an offense that is enhanced by more than one penalty enhancer, for example, both the dangerous weapons enhancer and the "hate crimes" enhancer. The Committee recommends that a statute be developed that directs the court in the multiple enhancer situation to first compute the penalty increase authorized by those enhancer statutes with a fixed amount of enhancement (e.g., the domestic abuse, hate crimes and violent crime in a school zone enhancers) and then compute any increase authorized by an enhancer statute with a sliding schedule of increases (e.g., the weapons enhancer). The habitual criminality increase (Wis. Stat. sec. 939.62), if involved in the case, is computed last of all.

[175] Wis. Stat. sec. 946.43.

The Committee recommends that the following penalty enhancers found in Chapter 939 be recast as sentencing aggravators and codified in an omnibus sentencing statute which directs the judge to consider them when imposing sentence but provides that they are not elements of crimes:

- The defendant committed the crime while his or her usual appearance was concealed, disguised or altered, with intent to make it less likely that he or she would be identified with the crime;[176]

- The defendant committed any felony while wearing a bulletproof garment;[177]

- The defendant committed a violation of secs. 940.19(2), (3), (4), (5) or (6), 940.225(1), (2) or (3), 940.23 or 943.32 against a person who at the time was 62 years of age or older;[178]

- The defendant committed the crime for the benefit of, at the direction of or in association with any criminal gang, with the specific intent to promote, further or assist in any criminal conduct by criminal gang members;[179]

- The defendant committed a violation of secs. 940.225(1) or (2), 948.02(1) or (2) 948.025 and at the time knew that he or she had syphilis, gonorrhea, hepatitis B, hepatitis C, chlamydia, or acquired immunodeficiency syndrome or has had a positive test for the presence of HIV, antigen or nonantigenic products of HIV or an antibody to HIV.[180]

- The defendant committed a crime using information that was disclosed to him or her under sec. 301.46.[181] (sex offender registry)

- Terrorism[182]

The Committee further recommends that the following enhancers codified other than in Chapter 939 be recast as sentencing aggravators:

[176] Currently codified at Wis. Stat. sec. 939.641.
[177] Currently codified at Wis. Stat. sec. 939.64.
[178] Currently codified at Wis. Stat. sec. 939.647.
[179] Currently codified at Wis. Stat. sec. 939.625.
[180] Currently codified at Wis. Stat. sec. 939.622.
[181] Currently codified at Wis. Stat. sec. 939.646.
[182] Currently codified at Wis. Stat. sec. 939.648.

- The defendant committed a violation of secs. 948.02(1) or (2) against a child and at the time was a person responsible for the welfare of that child, as defined in sec. 948.01(3).[183]

- The defendant committed a violation of sec. 948.025 against a child and at the time was a person responsible for the welfare of that child, as defined in sec. 948.01(3).[184]

- The defendant committed a violation of sec. 948.03 against a child and at the time was a person responsible for the welfare of that child, as defined in sec. 948.01(3).[185]

- The defendant committed a violation of sec. 940.09(1) or 940.25(1) and there was a minor passenger under 16 years of age in the motor vehicle at the time of the offense.[186]

- Various enhancers codified in Chapter 961.[187]

Finally, the Committee recommends repeal of a penalty doubler that is codified in the Habitual Traffic Offenders ("HTO") chapter of the Wisconsin Statutes[188] but which affects in a drastic way numerous Criminal Code offenses. A person with a serious traffic record may be declared a habitual traffic offender and have his or her operating privilege revoked for 5 years on that basis.[189] After 2 years of the revocation period have elapsed, that person may apply for and obtain an occupational license.[190] If that person thereafter commits a violation of one of the offenses listed in the HTO statute (for example, second-degree reckless conduct involving use of a vehicle, homicide by intoxicated use of a vehicle, homicide by negligent operation of a vehicle, and many others[191]), the penalties for these crimes are doubled. This means, for example, that under the Committee's proposed classification system, the maximum term of imprisonment for second-degree reckless homicide would be doubled from 25 to 50 years solely

[183] Currently codified at Wis. Stat. sec. 948.02(3m). Footnotes 45 & 49 above, which accompany the classification of secs. 948.02(1) and (2) in Classes B and C respectively, explain why this enhancer is recommended for recasting as a penalty enhancer.
[184] Currently codified at Wis. Stat. sec. 948.025(2m). Footnotes 46 & 48 above, which accompany the classification of sec. 948.025 in both Class B and C respectively, explain why this enhancer is recommended for recasting as a penalty enhancer.
[185] Currently codified at Wis. Stat. sec. 948.03(5). The crime of physical abuse of a child is stratified through several felony classes depending upon harm caused and the mental state of the actor. The Committee believes that there is sufficient confinement and extended supervision time in these classes to address the aggravating circumstance of the crime being committed by a person responsible for the victim's welfare. Accordingly, it recommends recasting the sec. 948.03(5) enhancer as a sentencing aggravator.
[186] Currently codified at Wis. Stat. sec. 940.09(1b) and 940.25(1b)
[187] Chapter 961 penalty enhancer changes are recommended in this report at p. 79.
[188] Wis. Stat. ch. 351.
[189] See Wis. Stat. sec. 351.025.
[190] See Wis. Stat. sec. 351.07(1).
[191] See Wis. Stat. sec. 351.02(1)(a).

because the offender was a HTO with an occupational license. There would be no impact on the homicide penalty, however, if the same habitual traffic offender had never obtained an HTO occupational license. The Committee believes that doubling penalties simply because the actor is a habitual traffic offender with an occupational license is unwarranted and therefore recommends repeal of this penalty doubler.

g. Minimum Sentences and Mandatory Consecutive Sentences. The Committee makes a general recommendation that provisions in criminal statutes establishing minimum sentences (presumptive or otherwise) or mandatory consecutive sentences be repealed. This is consistent with the general approach to crime classification and penalty variations embraced by the legislature when it first undertook the process of crime classification more than twenty years ago. It allows the court maximum sentencing discretion to deal with the multitude of offenders who commit crimes and the multitude of ways in which they do so. Guided by sound judicial discretion and assisted by sentencing guidelines (when the crime of conviction is one for which a guideline has been established), the judge should have maximum flexibility to mete out the appropriate sentence in every case. As a practical matter the Committee notes that when the circumstances which underlie these statutes are present in a particular case, they are properly matters for the prosecutor to argue at sentencing and will inevitably influence the court in determining the sentence to be imposed.

The observations in the preceding paragraph are subject to a limited number of exceptions. There is no recommendation to change mandatory life imprisonment for Class A felonies, nor is there a recommendation to change the provisions of the persistent repeater ("three strikes" or "two strikes") statute which, if invoked, mandate life imprisonment. Finally, the Committee recommends maintaining the structure of minimum mandatory penalties for repeat OWI offenders. Those exceptions aside, the Committee suggests the repeal of the following Criminal Code statutes or parts thereof:

- Wis. Stat. sec. 939.615(7)(c) Violation of a Condition of Lifetime Supervision (consecutive sentence provision only)[192]

- Wis. Stat. sec. 939.623 Increased Penalty; Repeat Serious Sex Crimes[193]

[192] Wis. Stat. sec. 939.615(7) establishes penalties for certain sex offenders who are placed on lifetime supervision and violate a condition of that supervision. Under present law this offense is punished either as a Class A misdemeanor or a Class E felony. However, if the person is convicted of violating this statute for the same conduct that resulted in the person being convicted of another crime, the sentence imposed for a violation of this statute must be consecutive to any sentence imposed for the other crime.

This is one of the very few situations where the law requires the court to impose a consecutive sentence. In virtually every other sentencing context, the law trusts the judge to appropriately decide whether a sentence should be concurrent with or consecutive to another sentence. There is no reason not to likewise trust the judge in the sec. 939.615(7) context.

[193] Wis. Stat. sec. 939.623 provides that if a person has one or more prior convictions for a serious sex crime (defined as first or second degree sexual assault), the court shall sentence the person to not less than

- Wis. Stat. sec. 939.624 — Increased Penalty; Repeat Serious Violent Crimes[194]
- Wis. Stat. sec. 939.63(2) — Penalties; Use of Dangerous Weapon (minimum term only)[195]
- Wis. Stat. sec. 939.635 — Penalties; Assault or Battery in Secured Juvenile Facilities or to Aftercare Agent[196]
- Wis. Stat. sec. 941.296(3) — Use or Possession of a Handgun and An Armor-Piercing Bullet During Crime (consecutive sentence provision only)[197]

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5 years imprisonment, but otherwise the penalties for the new crime apply, subject to any penalty enhancement. The court shall not place the person on probation.

This statute truly is not a penalty enhancer, although the title of the statute speaks of an "increased penalty." Rather, it establishes a minimum term of imprisonment. It is thus inconsistent with the general approach of the Committee to recommend that, except for life imprisonment felonies, minimum terms of imprisonment should be repealed. Further, as a practical matter, there is little or no likelihood that a person who qualifies as a serious sex offender and then commits another sexual assault would be placed on probation or receive a sentence of less than five years.

[194] Wis. Stat. sec. 939.624 provides that if a person has one or more prior convictions for a serious violent crime (defined as felony murder or second-degree intentional homicide) or a crime punishable by life imprisonment and subsequently commits felony murder or second-degree intentional homicide, the court shall sentence the person to not less than 5 years in prison, but otherwise the penalties for new crime apply, subject to any applicable penalty enhancements. The court shall not place the defendant on probation.

Like sec. 939.623 discussed in the preceding footnote, this statute is not truly a penalty enhancer even though the title of the statute speaks of an "increased penalty." If the unusual circumstances described in this statute should occur, the court must sentence the person to a minimum prison term. For the same reasons described in the preceding footnote, the Committee recommends repeal of this statute.

[195] Wis. Stat. sec. 939.63 is a penalty enhancer available when the defendant commits a crime while possessing, using or threatening to use a dangerous weapon. The Committee recommends that this enhancer be retained as an enhancer and further recommends that the amount of imprisonment by which the penalty for the underlying crime may be increased be retained without change. However, it recommends that sub.(2) of the statute, which establishes certain minimum terms of imprisonment when the underlying crime is a felony, be repealed. This is consistent with the Committee's general approach of removing presumptive minimum penalties from the criminal law in favor of maximizing judicial discretion in the imposition of sentences.

[196] Though codified with the Chapter 939 penalty enhancers, this statute really amounts to a presumptive minimum sentencing statute. As indicated in the text, the Committee recommends repeal of all presumptive minimum sentencing provisions.

[197] Wis. Stat. sec. 941.296(3) provides that a court shall impose a sentence for this crime consecutive to any sentence previously imposed or that may be imposed for the crime that the person committed while using or possessing a handgun loaded with an armor-piercing bullet.

This offense is currently a Class E felony and would naturally convert to a Class I felony in the proposed A-I felony classification system. The Committee recommends that the offense be raised to a Class H felony. However, it recommends that the consecutive sentencing provision be repealed. This is one of the few situations where the law requires the court to impose a consecutive sentence. In virtually every other sentencing context, the law trusts the judge to decide whether a sentence should be concurrent

- Wis. Stat. sec. 946.42(4) Escape (consecutive sentence provision only)[198]
- Wis. Stat. sec. 946.425(2) Failure to Report to Jail (consecutive sentence provision only)[199]
- Wis. Stat. sec. 948.36 Use of a Child to Commit a Class A Felony[200]
- Wis. Stat. sec. 948.605(4) Gun-Free School Zones (consecutive sentence provision)[201]

h. Felony Murder. The felony murder statute[202] should be amended to provide that the maximum penalty for the underlying offense may be increased by not more than 15 years. Under present law the increase is 20 years, but applying the mandatory release converter (2/3rds of the maximum possible imprisonment), which has been used to convert all felonies to the new A-I classification system, this number (20) should be reduced to 15.

i. Carjacking Resulting in Death. Carjacking resulting in death[203] is currently classified as a Class A felony. The Committee recommends treating this offense like armed robbery and including it within the catalogue of offenses that receive felony murder treatment under Wis. Stat. sec. 940.03. Armed robbery and carjacking are very similar to each other and, as proposed by the Committee, both would be classified as

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with or consecutive to another sentence. The same discretion should be afforded in the sec. 941.296 context.

[198] Wis. Stat. sec. 946.42(4) provides that a sentence for escape must be consecutive to any sentence previously imposed or which may be imposed for any crime or offense for which the person was in custody when he or she escaped.

The Committee recommends repeal of this mandatory consecutive sentence provision. This too is one of the few situations where the law requires the court to impose a consecutive sentence. In virtually every other sentencing context, the law authorizes the judge to decide whether a sentence should be concurrent with or consecutive to another sentence. The same discretion should be afforded here.

[199] Sentencing for failure to report to jail is treated much like sentencing for escape described in the preceding note. For the same reasons the Committee recommends repeal of that part of the statute mandating a consecutive sentence.

[200] In essence this statute adds 5 years to a life term if a person who has attained the age of 17 years advises, hires, counsels, procures, etc. a person 17 years of age or younger to commit a Class A felony and the latter is actually committed by the child. In the view of the Committee sec. 939.05(2)(c) makes the adult in these circumstances a party to the Class A felony and he or she would thus face life imprisonment. In the world of Truth-in-Sentencing, the 5-year enhancer is unnecessary.

[201] The Gun-free School Zone statute provides that, if a term of imprisonment is imposed for a violation thereof, the court shall impose the sentence consecutive to any other sentence. The Committee recommends repeal of this mandatory provision. Imposing a sentence of incarceration for a violation of this statute is discretionary with the judge; no jail term is mandated. Further, the Committee believes the court should have the same discretion to impose a concurrent or consecutive sentence for a violation of this law that it has for virtually every other violation of the criminal law, including many more serious crimes.

[202] See Wis. Stat. sec. 940.03.

[203] Wis. Stat. sec. 943.23(1r).

Class C felonies. If death results from either, the prosecutor should have the similar option of proceeding with a felony murder charge. Of course, if the factual circumstances of the case so warrant, the state may forego a felony murder charge in favor of a combination of other charges, like first-degree intentional homicide and carjacking (just as it often does when it charges first-degree intentional homicide along with armed robbery).

j. Possession of Firearm by Felon. The Committee recommends classifying the crime of possession of a firearm by a felon[204] as a Class G felony with a maximum term of confinement of five years followed by a maximum term of extended supervision of five years. Under present law a violation of this statute is punishable as a Class E felony for which the maximum term of imprisonment is two years.[205] If the actor is a repeat violator of this statute, the offense is punishable as a Class D felony for which the maximum term of imprisonment is currently set at five years.[206] The Committee recommends making all violations of the statute punishable by up to five years in prison. The severity of the offense and the potential for violence posed by those who are prohibited from possessing firearms prompted the proposed classification at the G level. The new five-year exposure is sufficient to deal even with repeat offenders and therefore the Committee recommends repeal of the repeater which is built into the current statute.

k. Operating Vehicle without Owner's Consent. The operating vehicle without owner's consent (OMVWOC) statute prohibits taking and driving any vehicle without the consent of the owner (recommended for classification as a Class H felony).[207] It also prohibits driving or operating any vehicle without the consent of the owner (recommended for classification as a Class I felony).[208] There is no misdemeanor joyriding offense except for one dealing with passengers who know that the vehicle is being driven without the owners consent.[209]

The Committee recommends that a misdemeanor joyriding statute be restored to the OMVWOC law. It uses the term "restore" because such a statute used to be part of the OMVWOC law. In essence it provided that whoever violated the OMVWOC law (normally a felony) would be guilty of a Class A misdemeanor if he or she abandoned the vehicle without damage within 24 hours.[210] The misdemeanor portion of the statute was subsequently repealed.

The Committee recommends the restoration of a misdemeanor OMVWOC consent offense to read as follows:

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[204] Wis. Stat. sec. 941.29.
[205] Wis. Stat. sec. 941.29(2).
[206] Wis. Stat. sec. 941.29(2m).
[207] Wis. Stat. sec. 943.23(2).
[208] Wis. Stat. sec. 943.23(3).
[209] Wis. Stat. sec. 943.23(4m).
[210] See Wis. Stat. sec. 943.23(2) (1977).

It is an affirmative defense to a prosecution for a violation of sub. (2) or (3) [of Wis. Stat. sec. 943.23] if the defendant abandoned the vehicle without damage within 24 hours after the vehicle was originally taken from the possession of the owner. An affirmative defense under this subsection mitigates the offense to a Class A misdemeanor. A defendant who raises this affirmative defense has the burden of proving the defense by a preponderance of the evidence.

This statute provides an option for disposing of OMVWOC consent cases at the misdemeanor level when the deprivation is brief in duration and involves no property damage to the vehicle. The proposed statute resolves difficult proof issues that existed under the prior misdemeanor law by clearly articulating that abandonment without damage within 24 hours of the taking is an affirmative defense as to which the defendant bears the burden of proof by a preponderance of the evidence.

l. Felony/Misdemeanor Distinction in Certain Property Crimes. Several crimes against property, like theft,[211] receiving stolen property,[212] issuing worthless checks,[213] financial transaction card crimes,[214] criminal damage to property[215] and others, are graded according to the value of the property misappropriated or the amount of damage caused, as the case may be. Under current law, these offenses are misdemeanors unless value or damage exceeds $1,000. Over time, the legislature has adjusted the dollar cut-off between misdemeanors and felonies for these offenses, but has not done so for nearly a decade.[216] The Committee believes that an adjustment is now due and recommends that the cut-off be raised to $2,000.

m. Juvenile Absconding Statutes. Under current law each felony class has a provision dealing with the rare and specialized situation of a juvenile who absconds after being adjudicated delinquent and then fails to return to court for a dispositional hearing before attaining the age of 17.[217] This offense is punishable as a felony at the same level as the offense of which the actor would have been guilty had his or her conduct been committed by an adult. For example, it is a Class B felony to abscond after having been adjudicated delinquent for committing an act that would be a Class B felony if committed by an adult.

The Committee debated the classification of this absconding provision at length. It recognizes the anomaly that the juvenile who appears as required for a dispositional hearing before turning 17 is subject to a juvenile disposition, but if the very same juvenile fails to appear before turning 17, he or she may be prosecuted under the absconding

[211] Wis. Stat. sec. 943.20.
[212] Wis. Stat. sec. 943.34.
[213] Wis. Stat. sec. 943.24.
[214] Wis. Stat. sec. 943.41.
[215] Wis. Stat. sec. 943.01(2)(d).
[216] The last adjustment was made in 1991 for most of these offenses when the cutoff between misdemeanors and felonies was raised from $500 to $1,000. See 1991 Wis. Act 39.
[217] Wis. Stat. sec. 946.50.

statute and in some cases face an adult sentence of much greater length. But the Committee also recognizes another anomaly in the law. If a juvenile absconds prior to adjudication and does not become adjudicated before turning 17, the prosecutor may waive him or her to adult court on the underlying charge,[218] whereas if the same juvenile is adjudicated prior to turning 17 but is returned to custody after turning 17, he or she cannot be waived on the underlying charge and, except for a few very serious felonies, would only to subject to a disposition lasting until his or her 18th birthday. The absconding statute attempts to deal with the latter situation.

Though there are to date only a handful of cases in which this statute has been enforced, the Committee recommends retaining it and extending its application to all classes of felonies in the new A-I classification system. Though not totally satisfied with this result because of the first anomaly described above, it appreciates the need to fill the gap which exists because of the second. Perhaps a better solution would be to allow the adjudication of the juvenile who absconds after adjudication and is not returned to court before turning 17 to be vacated and to thereafter permit the filing of an adult charge on the underlying offense. However, making such a change would require amendments to the Juvenile Code which should not be pursued until juvenile law experts have had a chance to consider the matter and until all double jeopardy issues relating to such a change are thoroughly investigated.

n. Solicitation of a Child to Commit a Felony. Wis. Stat. sec. 948.35 is an inchoate solicitation statute for use when the person solicited is 17 years of age or under. The Committee recommends the repeal of this statute. In its view, the penalties under the general solicitation statute[219] are sufficient to address the dangers of inchoate solicitation. Whether the actor solicited a child to commit an offense is an aggravating circumstance to be considered by the court at sentencing.

E. Proposed Classification of Criminal Code Class A Misdemeanors

Act 283 directs this Committee to study the penalties "for all felonies and Class A misdemeanors." It further provides that the committee shall classify "each felony and Class A misdemeanor in a manner that places crimes of similar severity into the same classification." There is no directive in Act 283 to classify misdemeanors that are presently unclassified.

The Committee has examined all crimes currently assigned status as Class A misdemeanors in the Criminal Code using the classification criteria described earlier in this report. Except as noted below, it has concluded that they are all properly classified as Class A misdemeanors and therefore ought to be retained in that classification.

[218] See Wis. Stat. 938.18(2).
[219] See Wis. Stat. sec. 939.30.

The changes which the Committee recommends are as follows:

- Stalking[220] should be elevated to a Class I felony.

- Criminal Damage to Railroad Property[221] should be elevated to a Class I felony.

- The "value" level at which the following crimes are classified as Class A misdemeanors should be raised to a new ceiling of $2,000:

    1. Theft[222]

    2. Fraud on Hotel or Restaurant Keeper or Taxicab Operator[223]

    3. Issuance of Worthless Check[224]

    4. Removing or Damaging Encumbered Real Property[225]

    5. Receiving Stolen Property[226]

    6. Fraudulent Insurance and Employee Benefit Program Claims[227]

    7. Financial Transaction Card Crimes[228]

    8. Retail Theft[229]

- Possession of a Firearm in a School Zone[230] should be elevated to a Class I felony.

- Discharge of a Firearm in a School Zone[231] should be elevated to a Class G felony.

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[220] Wis. Stat. sec. 940.32(2) (1997).
[221] Wis. Stat. sec. 943.07(1) & (2) (1997).
[222] Wis. Stat. sec. 943.20(3)(a) (1997).
[223] Wis. Stat. sec. 943.21(3)(a) (1997).
[224] Wis. Stat. sec. 943.24(1) (1997).
[225] Wis. Stat. sec. 943.26(1) (1997).
[226] Wis. Stat. sec. 943.34(1)(a) (1997).
[227] Wis. Stat. sec. 943.395(2)(a) (1997).
[228] Wis. Stat. sec. 943.41(8)(c) (1997).
[229] Wis. Stat. sec. 943.50(4)(a) (1997).
[230] Wis. Stat. sec. 948.605 (2) (1997).
[231] Wis. Stat. sec. 948.605(3) (1997).

- Carrying Firearm in a Public Building[232] should be elevated from a Class B misdemeanor to a Class A misdemeanor.

- Fornication[233] should be renamed "Public Fornication" to more accurately depict the nature of the offense and should remain classified as a Class A misdemeanor.

- The crime of Criminal Damage to Certain Coin-Operated or Card-Operated Machines with Intent to Commit Theft[234] should be repealed. The harm covered by this statute is adequately addressed by several other crimes, including Damage to Property,[235] Attempted Theft,[236] and Entry Into Locked Coin Box.[237]

[232] Wis. Stat. sec. 941.235(1) (1997).
[233] Wis. Stat. sec. 944.15 (1997).
[234] Wis. Stat. sec. 943.01(2g) (1997).
[235] Wis. Stat. sec. 943.01 (1997).
[236] Wis. Stat. sec. 943.20 & 939.32 (1997).
[237] Wis. Stat. sec. 943.125 (1997).

F. Classification of Chapter 961 Drug Offenses

1. Introduction

Most of Wisconsin's drug offenses are codified in Chapter 961 of the Statutes. This chapter is not part of the Wisconsin Criminal Code,[238] although many of the Code's general provisions apply to drug prosecutions[239] and, unless there is a specific provision to the contrary, so do the provisions of the Wisconsin Code of Criminal Procedure.[240]

Chapter 961 is a relatively self-contained drug code for the state. Beyond the complex set of crimes codified therein, it has its own declaration of legislative intent, its own set of definitions, and its own structure of sanctions. At present its felonies and misdemeanors are not classified in either the A-E felony classification system or the A-C misdemeanor classification system provided for in Wis. Stat. secs. 939.50 to 939.51.

The Committee used the same process for converting drug offenses to the new A-I classification system that it used for Criminal Code offenses as well as non-drug non-Criminal Code felonies.[241] The factors described earlier in this report which guided the classification of crimes in the new system were applied to drug offenses as well. However, with specific regard to drug crimes, the Committee also took into account the statement of legislative intent codified in Wis. Stat. sec. 961.001 as well as the interplay between the federal and state governments in the enforcement of overlapping drug laws.

2. Impact of Proposed Classification of Drug Offenses

Under current law drug offenses are not classified; each has a specific penalty articulated in Chapter 961. For drugs that are stratified by amounts delivered or possessed with the intent to deliver, different penalty systems are used. In some instances the maximum amount of imprisonment escalates with the amount of the drug. In others presumptive minimum penalties are used to distinguish among amounts. In yet others a combination of these approaches is used.

Bringing drugs within a uniform system for classifying crimes (a charge given to the Committee by the legislature) means that the penalty structure for these offenses will be expressed in terms of a maximum fine and a maximum term of imprisonment. Once a drug offense is placed in a given felony classification, the penalty range for that classification will apply.

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[238] Chapters 939 to 951 comprise the Wisconsin Criminal Code. See Wis. Stat. sec. 939.01.
[239] Wis. Stat. sec. 939.20 provides: "Sections 939.22 to 939.25 [definitions of criminal intent, criminal recklessness, criminal negligence, and other miscellaneous words and phrases] apply only to crimes defined in chs. 939 to 951. Other sections in ch. 939 [the general provisions of Wisconsin's substantive criminal law] apply to crimes defined in other chapters of the statutes as well as to those defined in chs. 939 to 951."
[240] Wis. Stat. sec. 967.01 provides in pertinent part that "Chapters 967 to 979 [the Wisconsin Criminal Procedure Code] shall govern all criminal proceedings….."
[241] See p. 21.

There is at least a two-fold impact of such classification. First, for all felony classes into which drugs have been placed, there is no minimum term of imprisonment and no minimum fine (presumptive or mandatory). In appropriate cases the judge would have the discretion to place the offender on probation. The Committee agrees that this is a desirable outcome of classifying drug offenses. It believes that judges should have the same full range of penalties available to them when sentencing drug offenders as they have when sentencing persons convicted of such dangerous offenses as homicide (other than first-degree intentional homicide), armed robbery, sexual assault, or aggravated burglary. It also believes that the exercise of sound judicial discretion in sentencing drug offenders should not be restricted by minimum penalties when the legislature has not seen fit to so restrict discretion when sentencing offenders convicted of other serious felonies like those noted above.[242]

Another impact of classification is the reduction in maximum fines. Under current law fines top out at $100,000 for THC (marijuana), $500,000 for cocaine, $500,000 for LSD, $500,000 for methamphetamine, amphetamine, phencyclidine (PCP) and methcathinone, and $1,000,000 for heroin. These amounts double for repeat offenders. As a practical matter such enormous fines are never imposed on state law offenders and, if a drug defendant has sizable assets linked to his or her illicit activities, the forfeiture laws will be used to seize them. The latter is most attractive to the authorities because it results in some or all of the forfeited assets being retained by law enforcement agencies for official use.[243] The Committee recommends that its proposed fine structure for other classified felonies be applied to drug felonies as well. The maximum fines in the uniform fine structure are more than sufficient to encompass the kinds of fines judges impose in state drug prosecutions today.

These changes are in no way intended to depreciate the seriousness of drug offenses or to minimize the impact drugs have had on modern society. Rather, they bring drugs into the kind of uniform classification system which the Committee believes was intended by the legislature when it commanded that "a uniform classification system for all felonies, including felonies outside of the criminal code"[244] be created.

[242] The Committee recognizes that some presumptive minimum penalties are used in the penalty enhancer statutes. It will be recommending that these be repealed as well for the same reasons as those articulated in the text accompanying this note.
[243] See Wis. Stat. sec. 961.55 et seq.
[244] See 1997 Wis. Act 283 sec. 454(1)(e)1.

3. Proposed Classification of Drug Offenses

COLOR CODES

ENTRIES IN GREEN REFLECT UPWARD CLASS ADJUSTMENT AFTER APPLICATION OF M.R. CONVERTER.

ENTRIES IN BLUE REFLECT NEW CRIMES RECOMMENDED FOR ENACTMENT BY THE LEGISLATURE OR EXISTING CRIMES FOR WHICH SIGNIFICANT AMENDMENTS ARE PROPOSED.

ENTRIES IN RED REFLECT DOWNWARD CLASS ADJUSTMENT AFTER APPLICATION OF M.R. CONVERTER.

ENTRIES IN BLACK REFLECT THE NATURAL PLACEMENT OF CRIMES IN A-I SYSTEM AFTER APPLICATION OF THE M.R. CONVERTER.

NOTE: Each entry in green and red is accompanied by a parenthetical which indicates "from ____." Red and green entries mean that an adjustment has been made either upward (green) or downward (red) from the felony class where a crime would naturally be placed by application of the M.R. converter. The "from" indicates where natural placement would be in the new Class A-I system.

KEY TO ABBREVIATIONS

DELIVERY: Manufacture, distribution or delivery
COCAINE: Cocaine or cocaine base
METH: Phencyclidine, amphetamine, methamphetamine or methcathinone
LSD: lysergic acid diethylamide
PSILOCIN: psilocin or psilocybin
THC: tetrahydracannibonols (marijuana). **NOTE**: All weight values for THC should also be expressed in terms of the number of plants with the converter of 1 plant = 50 grams applied.

CLASS A (LIFE)

NO ENTRIES

CLASS B (40 MAX PRISON; 20 E.S.)

NO ENTRIES

CLASS C (25 MAX PRISON; 15 E.S.)

Delivery of COCAINE > 40 g[245]	961.41(1)(cm)4
Possession of COCAINE w/intent to deliver > 40 g[246]	961.41(1m)(cm)4
Delivery of HEROIN, > 50 g[247]	961.41(1)(d)4
Possession of HEROIN w/intent to deliver > 50 g[248]	961.41(1m)(d)4
Delivery of METH > 50 g (from E)[249]	961.41(1)(e)4
Possession of METH w/intent to deliver > 50 g (from E)[250]	961.41(1m)(e)4

[245] The Committee recommends that all cocaine delivery offenses involving more than 40 grams be classified as a C felony. It further recommends that the categories of 40-100 grams and more than 100 grams for this offense be eliminated. Using the Class C felony classification for all offenses over 40 grams provides the courts with 25 years of real prison time within which to sentence the most serious of offenders who are prosecuted under state law. The Committee has taken into consideration the fact that the most serious violators of cocaine delivery laws are prosecuted in the federal system. In the view of the Committee 25 years of exposure for state crimes is sufficient and the additional categories of 40-100 and more than 100 grams are therefore unnecessary.

[246] See preceding note.

[247] The Committee recommends that all heroin delivery offenses involving more than 50 grams be classified as a C felony. It further recommends that the categories of 50-200 grams, 200-400 grams, and more than 400 grams for this offense be eliminated. Using the Class C felony classification for all offenses over 50 grams provides the courts with 25 years of real prison time within which to sentence the most serious of offenders who are prosecuted under state law. The Committee has taken into consideration the fact that the most serious violators of heroin delivery laws are prosecuted in the federal system. In the view of the Committee 25 years of exposure for state crimes is sufficient and the additional categories of 50-200, 200-400, and more than 400 grams are therefore unnecessary.

[248] See preceding note.

[249] The Committee recommends that all delivery methamphetamine, amphetamine, phencyclidine (PCP) and methcathinone offenses involving more than 50 grams be classified as a C felony. It further recommends that the categories of 50-200 grams, 200-400 grams, and more than 400 grams for these offenses be eliminated. Using the Class C felony classification for all offenses over 50 grams provides the courts with 25 years of real prison time within which to sentence the most serious of offenders who are prosecuted under state law. The Committee has taken into consideration the fact that the most serious violators of these delivery laws are subject to prosecution in the federal system. In the view of the Committee 25 years of exposure for state crimes is sufficient and the additional categories of 50-200, 200-400, and more than 400 grams are therefore unnecessary. The Committee has considered the threat to public safety posed by recent increases in methamphetamine activity (most notably in the rural parts of western Wisconsin) and has noted the pending legislation to treat this substance on a par with heroin, which the recommendation of the Committee does. See 1999 A.B. 318.

[250] See preceding note.

CLASS D (15 MAX PRISON; 10 E.S.)

Delivery of COCAINE > 15 g but ≤ 40 g	961.41(1)(cm)3
Possession of COCAINE w/ int. to deliver > 15 but ≤ 40 g	961.41(1m)(cm)3
Delivery of HEROIN, > 10 g but ≤ 50 g	961.41(1)(d)3
Possession of HEROIN w/intent to deliver > 10 g but ≤ 50 g	961.41(1m)(d)3
Delivery of METH > 10 g but ≤ 50 (from E)	961.41(1)(e)3
Possession of METH w/intent to deliver > 10 g but ≤ 50 g (from E)	961.41(1m)(e)3

CLASS E (10 MAX PRISON; 5 E.S.)

Delivery of COCAINE > 5 g but ≤ 15 g	961.41(1)(cm)2
Possession of COCAINE w/ int. to deliver > 5 but ≤ 15 g	961.41(1m)(cm)2
Delivery of HEROIN, > 3 g but ≤ 10 g	961.41(1)(d)2
Possession of HEROIN w/intent to deliver > 3 g but ≤ 10 g	961.41(1m)(d)2
Delivery of METH > 3 g but ≤ 10 (from H)	961.41(1)(e)2
Possession of METH w/intent to deliver > 3 g but ≤ 10 g (from H)	961.41(1m)(e)2
Delivery of LSD > 5 g	961.41(1)(f)3
Possession of LSD w/intent to deliver > 5 g	961.41(1m)(f)3
Delivery of THC > 10,000 g[251]	NEW STATUTE
Possession of THC w/ intent to deliver > 10,000 g[252]	NEW STATUTE
Delivery of a narcotic drug included in Schedule I or II	961.41(1)(a)
Possession w/intent to deliver a narcotic drug included in Schedule I or II	961.41(1m)(a)
Delivery of PSILOCIN > 500 grams	961.41(1)(g)3
Possession w/intent to deliver PSILOCIN > 500 grams	961.41(1m)(g)3
Delivery or possession w/intent to deliver a counterfeit substance included in Schedule I or II which is a narcotic drug	961.41(2)(a)

CLASS F (7.5 MAX PRISON; 5 E.S.)

Delivery of COCAINE > 1 g but ≤ 5 g	961.41(1)(cm)1
Possession of COCAINE w/ int. to deliver > 1 but ≤ 5 g	961.41(1m)(cm)1
Delivery of HEROIN ≤ 3g	961.41(1)(d)1
Possession of HEROIN w/intent to deliver ≤ 3 g	961.41(1m)(d)1
Delivery of METH ≤ 3 (from H)	961.41(1)(e)1
Possession of METH ≤ 3 g (from H)	961.41(1m)(e)1
Delivery of LSD > 1 g but ≤ 5 g (from H)	941(1)(f)2
Possession of LSD w/intent to deliver > 1 g but ≤ 5 g (from H)	961.41(1m)(f)2

[251] Under current law the maximum penalties for delivery of THC apply to deliveries of 2500 g or more. Considering the great range between this amount and the amount at which federal authorities are likely to become interested in the case (100-400 kilograms) and given that state cases can involve amounts well in excess of 2500 g, the Committee recommends that the amount categories on the higher end be as follows: > 10,000, 2500 to 10,000, and 1000-2500 grams.

[252] See preceding note.

CLASS F (7.5 MAX PRISON; 5 E.S.) (continued)

Delivery of THC > 2500 g but ≤ 10,000 g	NEW STATUTE
Possession of THC w/intent to deliver > 2500 g but ≤ 10,000 g	NEW STATUTE
Delivery of PSILOCIN >100 but ≤ 500 grams	961.41(1)(g)2
Possession of PSILOCIN w/intent to deliver >100 but ≤ 500 g	961.41(1m)(g)2
False or fraudulent drug tax stamp	139.95(3)
Possession of any amount of piperidine	961.41(1n)(c)
Use of a person who is under the age of 17 for the purpose of the delivery of a controlled substance[253]	961.455(1)

CLASS G (5 MAX PRISON; 5 E.S.)

Delivery of COCAINE ≤ 1 g[254]	NEW STATUTE
Possession of COCAINE w/ int. to deliver ≤ 1 g[255]	NEW STATUTE
Delivery of LSD ≤ 1 g (from H)	961.41(1)(f)1
Possession of LSD w/intent to deliver ≤ 1 g (from H)	961.41(1m)(f)1
Delivery of THC > 1000 but ≤ 2500 g[256]	961.41(1)(h)3
Possession of THC w/intent to deliver > 1000 but ≤ 2500[257]	961.41(1m)(h)3
Delivery of PSILOCIN < 100 grams	961.41(1)(g)1
Possession of PSILOCIN w/intent to deliver < 100 grams	961.41(1m)(g)1

CLASS H (3 MAX PRISON; 3 E.S.)

Delivery of THC > 200 but ≤ 1000 g	961.41(1)(h)2
Possession of THC w/intent to deliver > 200 but ≤ 1000 g	961.41(1m)(h)2
Delivery of any other controlled substance included in Schedule I, II or III, or a controlled substance analog of any other controlled substance included in Schedule I or II	961.41(1)(b)
Delivery or possession with intent to deliver any other counterfeit substance included in Schedule I, II or III	961.41(2)(b)

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[253] Statute should be amended to prohibit use of a person "under the age of 17 years" for the purpose of delivering a controlled substance. This would be consistent with recent amendments to Wisconsin's Juvenile Code.

[254] The Committee recommends creation of a new category for delivery of cocaine to cover amounts of 1 gram or less. This encompasses the vast majority of state delivery cases and the 5 year penalty of Class G is sufficient for offenses in this category. As a matter of fact sentencing data available from the Department of Corrections (as substantiated by the experience of experts who assisted the Committee) reveal that the vast majority of sentences statewide for deliveries of 5 grams or less (the lowest category under current law), when adjusted for truth in sentencing and time actually served, result in actual incarceration well within the 5-year range.

[255] See preceding note.

[256] Under current law the lower end THC weight categories are 500 g or less and more than 500 but less than 2500 grams. The Committee recommends that the amounts be more stratified to more accurately reflect the diversity of violations and to structure penalties accordingly. Thus it recommends that the lower end amount ranges be as follows: > 1000 but ≤ 2500 g, > 200 but ≤ 1000 g, and ≤ 200 g.

[257] See preceding note.

CLASS H (3 MAX PRISON; 3 E.S.) (continued)

Possession with intent to deliver any other controlled substance included in Schedule 1, II or III, or a controlled substance analog of a controlled substance included in Schedule I or II	961.41(1m)b
Possession of a Schedule I or II controlled substance not bearing drug tax stamp	139.95(2)
Delivery of a substance included in Schedule IV	961.41(1)(i)
Possession with intent to deliver a substance included in Schedule IV	961.41(1m)(i)
Delivery or possession with intent to deliver a counterfeit substance included in Schedule IV	961.41(2)(c)
Acquire or obtain a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge	961.43(2)
Possession or attempted possession of gammahydroxybutric acid, gammahydroxybutyrolactone, ketamine or flunirazepam[258] (from I)	961.41(3g)(f)

CLASS I (18 MO. MAX PRISON; 2 YRS E.S.)

Delivery of THC $\leq$ 200 g	961.41(1)(h)1
Possession of THC w/intent to deliver $\leq$ 200 g	961.41(1m)(h)1
Delivery of a substance included in Schedule V	961.41(1)(j)
Possession with intent to deliver a substance included in Schedule V	961.41(1m)(j)
Delivery or possession with intent to deliver a counterfeit substance included in Schedule V	961.41(2)(d)
Possession of a narcotic included in Schedule I or II[259]	961.41(3g)(a)1
Possession or attempted possession of Heroin	961.41(3g)(a)2
Distribution or delivery of imitation controlled substance	961.41(4)(am)3
Keeping of a drug house	961.42(2)

[258] The substances included in the text accompanying this footnote include what have come to be known as "date rape" drugs.

[259] A first offense under this statute is now punishable by 1 year and subsequent offenses are punishable by 2 years. The Committee recommends deleting this distinction, classifying all offenses a Class I felonies, and treating the fact of prior conviction as a sentencing factor or, when appropriate, as a basis for invoking repeat offender laws.

4. Depiction of Controlled Substances Offenses with Stratified Penalties in the A-I Classification System

ALL OFFENSES INCLUDE DELIVERY & POSSESSION WITH INTENT TO DELIVER

COKE = COCAINE
HEROIN = HEROIN
METH = METHAMPHETIMINE AMPHETAMINE, PHENCYCLIDINE (PCP) AND METHCATHINONE
PSILOCIN = PSILOCIN AND PSILOCYBIN
LSD = LYSERGIC ACID DIETHYLAMIDE
THC = TETRAHYDROCANNABINOLS (MARIJUANA)

A	B	C	D	E	F	G	H	I
		COKE > 40 g		PSILOCIN > 500 g				
			COKE > 15 g but ≤ 40 g		PSILOCIN > 100 g but ≤ 500 g			
		HEROIN > 50 g		COKE > 5 g but ≤ 15 g		PSILOCIN ≤ 100 g		
			HEROIN > 10 g but ≤ 50 g		COKE > 1 g but ≤ 5 g			
				HEROIN > 3 g but ≤ 10 g		COKE ≤ 1 g		
					HEROIN ≤ 3 g			
		METH > 50 g		THC > 10,000g				
			METH > 10 g but ≤ 50 g		THC > 2500but ≤ 10,000g			
				METH > 3 g but ≤ 10 g		THC > 1000but ≤ 2500 g		
					METH ≤ 3 g		THC >200 but ≤ 1000 g	
				LSD > 5 g				THC ≤ 200 g
					LSD > 1g but < 5 g			
						LSD < 1 g		

5. Additional Recommendations Regarding Controlled Substances Offenses

In addition to the classification of drug offenses described above, the Committee also makes the following recommendations regarding the provisions of Chapter 961 of the Statutes:

1. The penalty doubler for second and subsequent offenses[260] should be recast to resemble the general habitual criminality statute[261] but should remain codified in sec. 961.46 with the procedures now specified therein. In particular the Committee recommends that if a defendant is a second or subsequent drug offender,[262] the maximum term of imprisonment[263] may be increased as follows:

    - Four years if the present offense is a Class E, F, G, H or I felony.

    - Six years if the present offense is a Class C or D felony.[264]

2. Simple possession or attempted possession of (a) cocaine or cocaine base,[265] (b) lyseric acid diethylamide, phencyclidine, amphetamine, methamphetamine, methcathinone, psilocin or psilocybin,[266] and (c) tetrahydrocannibinols (THC),[267] all of which are misdemeanors, should retain their present misdemeanor penalties unless the offender qualifies as a second or subsequent offender,[268] in which case the possession or attempted possession offense should be classified as a Class I felony. The Committee makes no recommendation for changing the penalties of other misdemeanor offenses codified in Chapter 961. Nor does it classify those misdemeanors because doing so would be beyond the charge given to the Committee by the legislature.[269]

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[260] See Wis. Stat. sec. 961.48.
[261] See generally Wis. Stat. sec. 939.62.
[262] Persons qualifying as second or subsequent offenders are described in Wis. Stat. sec. 961.48(3).
[263] The proposal speaks of increasing the maximum period of incarceration for repeat drug offenders. It does not increase fines. Further, any reference to doubling minimum penalties should be deleted because of the general recommendation against the use of minimum penalties for drug and non-drug offenses alike.
[264] No drugs felonies are proposed for classification in Class A or B.
[265] See Wis. Stat. sec. 961.41(3g)(c).
[266] See Wis. Stat. sec. 961.41(3g)(d).
[267] See Wis. Stat. sec. 961.41(3g)(e).
[268] Persons qualifying as second or subsequent offenders are described in Wis. Stat. sec. 961.48(3).
[269] 1997 Wis. Act 283 sec. 454(1)(e)2 directs the Criminal Penalties Study Committee to classify "each felony and Class A misdemeanor." There is no direction to classify currently unclassified misdemeanors (like those in Chapter 961) though doing so may be desirable at some point in the future.

3. The penalty enhancer for distribution of or possession with intent to deliver a controlled substance on or near certain places (e.g., within 1,000 ft. of a park, jail or correctional facility, school, youth center, etc.)[270] should be set at 5 years. This is the same as present law except that under Truth-in-Sentencing it means 5 real years. The provisions for minimum penalties associated with this enhancer should be repealed for the reasons articulated above.[271] The judge should have the full range of penalties available when exercising sentencing discretion in these kinds of cases.

4. The penalty doubler for distribution to prisoners[272] should be recast as a statutory sentencing aggravator which may result in a lengthier disposition but which does not otherwise increase the maximum term of imprisonment. In this regard the Committee notes that one who distributes to a prisoner within the precincts of a prison, jail or other correctional facility will be subject to the penalty enhancer described in the preceding paragraph.

5. The penalty doubler for distribution to persons under age 18[273] should be recast as a sentencing enhancer which increases the maximum term of imprisonment by 5 years. The provision for doubling fines and presumptive minimum penalties should be repealed.

6. The penalty enhancer for distribution or possession with intent to deliver certain controlled substances on public transit vehicles[274] should be recast as a statutory sentencing aggravator which may result in a lengthier disposition but which does not otherwise increase the maximum term of imprisonment. The Committee believes that existing penalty ranges proposed for delivery and possession with intent to deliver are adequate to deal with the aggravating circumstance of delivery or possession with intent to deliver a controlled substance while on a public transit vehicle.

[270] See Wis. Stat. sec. 961.49.
[271] See p. 72.
[272] See Wis. Stat. sec. 961.465.
[273] See Wis. Stat. sec. 961.46.
[274] See Wis. Stat. sec. 961.492.

G. Classification of Non-Drug Non-Criminal Code Felonies

1. Introduction

The non-drug non-Criminal Code felonies analyzed in this section of the Committee's report, which number approximately 150, are scattered throughout the Wisconsin Statutes. These crimes are not part of the Wisconsin Criminal Code,[275] though many of the Code's general provisions apply to them[276] and, unless there is a specific provision to the contrary, so do the provisions of the Wisconsin Code of Criminal Procedure.[277] Under current law these felonies are not classified. Each offense has its own special penalty provision expressed in terms of incarceration or fine or both.

The Committee used the same approach for classifying non-drug non-Criminal Code offenses that it used for classifying Criminal Code felonies and drug felonies.[278] It used the mandatory release date under present law to convert these crimes into the A-I felony classification system. It then employed the classification factors discussed earlier to determine whether to make any class adjustments after the M.R. converter was applied.

The Committee notes that there are several felonies codified throughout the Statutes that are punishable by imprisonment for up to one year. It grappled with the issue of how best to classify these crimes. It had two choices: increase them to Class I felonies (confinement for not more than 18 months plus extended supervision for not more than two years or a $10,000 fine or both) or assign to them Class A misdemeanor penalties (imprisonment for not more than 9 months or a $10,000 fine or both). The Committee concluded that unless its classification criteria suggested than a penalty increase was warranted, it should apply the mandatory release converter generally used to classify felonies. This means that many of the one-year felonies have been assigned Class A misdemeanor penalties.

2. Impact of Classification on the Non-Drug Non-Criminal Code Penalties

Under current law these miscellaneous offenses are not classified; each has a specific penalty articulated for the particular statute and different penalty systems are used. In some instances a maximum fine and a maximum amount of imprisonment are specified. In others minimum fines and minimum periods of incarceration are included.

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[275] Chapters 939 to 951 comprise the Wisconsin Criminal Code. See Wis. Stat. sec. 939.01.
[276] Wis. Stat. sec. 939.20 provides: "Sections 939.22 to 939.25 [definitions of criminal intent, criminal recklessness, criminal negligence, and other miscellaneous words and phrases] apply only to crimes defined in chs. 939 to 951. Other sections in ch. 939 [the general provisions of Wisconsin's substantive criminal law] apply to crimes defined in other chapters of the statutes as well as to those defined in chs. 939 to 951."
[277] Wis. Stat. sec. 967.01 provides in pertinent part that "Chapters 967 to 979 [the Wisconsin Criminal Procedure Code] shall govern all criminal proceedings….."
[278] See p. 21.

For some of the latter probation is an option, but if the court elects to incarcerate, then the minimum period of incarceration must be imposed.

Bringing these miscellaneous offenses within a uniform system for classifying crimes (a charge given to the Committee by the legislature) means that the penalty structure for these offenses will be expressed in terms of a maximum fine and a maximum term of imprisonment. Once a crime is placed in a given felony classification, the penalty range for that classification will apply.

There is at least a two-fold impact of such classification. First, with the exception of 5th offense OWI for which a minimum mandatory term of imprisonment is preserved to maintain consistency in the structure of penalties for all OWI offenders, for all felony classes into which these miscellaneous felonies have been placed, there is no minimum term of imprisonment. In appropriate cases the judge would have the discretion to place the offender on probation. The Committee supports this result. It believes that judges should have the same full range of penalties available to them when sentencing violators of these miscellaneous offenses as they have when sentencing persons convicted of such dangerous offenses as homicide (other than first-degree intentional homicide), armed robbery, sexual assault, or aggravated burglary. It also believes that the exercise of sound judicial discretion in sentencing these offenders should not be restricted by minimum penalties when the legislature has not seen fit to so restrict discretion when sentencing offenders convicted of other serious felonies like those noted above.[279]

Another impact of classification occurs in the area of maximum fines. Under current law maximum fines vary with each offense. The Committee recommends that its proposed fine structure for other classified felonies be applied to these miscellaneous felonies as well with the exception of a few offenses for which the legislature is established particularly high fines for obvious reasons. As to the latter the Committee recommends that the current maximum fines be preserved. Further, unless specifically noted, the Committee recommends that minimum fines be abandoned. As a general principle it believes the court should have full discretion in deciding when to impose a fine and, if so, in what amount.

[279] The Committee recognizes that some presumptive minimum penalties are used in the penalty enhancer statutes. It will be recommending that these be repealed as well for the same reasons as those articulated in the text accompanying this note.

3. Proposed Classification of Non-Drug Felonies Codified Outside the Criminal Code

NOTE: THE LIST OF NON-DRUG FELONIES CODIFIED OTHER THAN IN THE WISCONSIN CRIMINAL CODE WAS DERIVED FROM DOCUMENTATION PREPARED BY THE WISCONSIN LEGISLATIVE REFERENCE BUREAU.

COLOR CODES

ENTRIES IN GREEN REFLECT UPWARD CLASS ADJUSTMENT AFTER APPLICATION OF M.R. CONVERTER.

ENTRIES IN BLUE REFLECT NEW CRIMES RECOMMENDED FOR ENACTMENT BY THE LEGISLATURE OR EXISTING CRIMES FOR WHICH SIGNIFICANT AMENDMENTS ARE PROPOSED.

ENTRIES IN RED REFLECT DOWNWARD CLASS ADJUSTMENT AFTER APPLICATION OF M.R. CONVERTER.

ENTRIES IN BLACK REFLECT THE NATURAL PLACEMENT OF CRIMES IN A-I SYSTEM AFTER APPLICATION OF THE M.R. CONVERTER.

NOTE: Each entry in green and red is accompanied by a parenthetical which indicates "from ____." Red and green entries mean that an adjustment has been made either upward (green) or downward (red) from the felony class where a crime would naturally be placed by application of the M.R. converter. The "from" indicates where natural placement would be in the new Class A-I system.

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A – I System
11.61(1)(a) and (b)	Criminal violations of campaign finance statutes	Fine not more than $10,000 or imprisoned not more than ***3 years*** or both	Class I
12.60(1)(a)	Criminal violations of elections statutes	Fine not more than $10,000 or imprisoned not more than ***3 years*** in the Wisconsin state prisons or both	Class I
13.05	Logrolling by members of the Legislature prohibited	Fine not less than $500 nor more than $1,000 or imprisoned for not less than one year nor more than ***3 years*** or both	Class I
13.06	Granting of executive favor by members of the Legislature prohibited	Fine not less than $500 nor more than $1,000 or imprisoned for not less than one year nor more than ***2 years*** or both	Class I
13.69(6m)	Criminal violations of lobby law statutes	Fine not more than $10,000 or imprisoned for not more than ***5 years*** or both	Class H
23.33(13)(cg)	Causing death or injury by interfering with all-terrain vehicle route or trail sign standard	Fine not more than $10,000 or imprisoned for not more than ***2 years*** or both if the violation causes the death or injury	Class H (from I)
26.14(8)	Intentionally setting fires to land of another or a marsh	Fine not more than $10,000 or imprisoned not more than ***5 years*** or both	Class H
29.971(1)(c)	Possession of fish with a value exceeding $1,000 in violation of statutes	Fine of not more than $10,000 or imprisonment for not more than ***2 years*** or both	Class I
29.971(1m)(c)	Possession of clams with a value exceeding $1,000 in violation of statutes	Fine of not more than $10,000 or imprisonment for not more than ***2 years*** or both	Class I
29.971(11m)(a)	Illegal shooting, shooting at, killing, taking, catching or possessing a bear	Fine of not more than $5,000 or imprisonment for not more than ***one year*** or both for the second and any subsequent violation	Class A misd. penalties (9 mos. or $10,000 or both)

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A – I System
29.971(11p)(a)	Entering the den of a hibernating black bear and harming the bear	Fine of not more than $10,000 or imprisonment for not more than ***one year*** or both	Class A misd. penalties (9 mos. or $10,000 or both)
30.80(3m)	Falsifying boat certificate or title, or altering hull or engine serial numbers	Fine not more than $5,000 or imprisoned not more than ***5 years*** or both	Class H
30.80(2g)(b)	Failure to render aid in a boating accident that involves injury to a person but not great bodily harm	Fine not less than $300 nor more than $5,000 or imprisoned not more than ***one year*** or both	Class A misd. penalties (9 mos. or $10,000 or both)
30.80(2g)(c)	Failure to render aid in a boating accident that involves injury to a person and the person suffers great bodily harm	Fine not more than $10,000 or imprisoned not more than ***2 years*** or both	Class I
30.80(2g)(d)	Failure to render aid in a boating accident that involves the death of a person	Fine not more than $10,000 or imprisoned not more than ***5 years*** or both	Class H
36.25(6)(d)	Improper release of mines and explored mine land information by employes of the Geological and Natural History Survey or Department of Revenue	Fine not less than $50 nor more than $500, or imprisoned in the county jail for not less than one month nor more than 6 months, or imprisoned in the Wisconsin state prisons for not more than ***2 years***	Class I
47.03(3)(d)	Illegal use of the term "blind-made"	Fine not more than $1,000 or imprisoned not more than ***one year*** or both	Class A misd. penalties (9 mos. or $10,000 or both)
49.127(8)(a)2.	Illegal use of food stamps with a value over $100 but less than $5000 - first offense	Fine not more than $10,000 or imprisoned not more than ***5 years*** or both	Class I (from H)
49.127(8)(b)2.	Illegal use of food stamps with a value over $100 but less than $5000 - second and subsequent offenses	Fine not more than $10,000 or imprisoned not more than ***5 years*** or both	Class H
49.127(8)(c)	Illegal use of food stamps with value of $5000 or more – Any offense	Fine not more than $250,000 or imprisoned not more than ***20 years*** or both.	Class G (from D)

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A – I System
49.141(7)(a)	Committing a fraudulent act in connection with providing items or services under W-2	Fine not more than $25,000 or imprisoned for not more than ***5 years*** or both	Class H
49.141(7)(b)	Committing other fraudulent acts to obtain W-2 benefits or payments	Fine not more than $10,000 or imprisoned for not more than ***one year*** or both	Class A misd. penalties (9 mos. or $10,000 or both)
49.141(9)(a)	Solicitation or receiving of a kickback, bribe or rebate in connection with providing items or services under W-2	Fine not more than $25,000 or imprisoned for not more than ***5 years*** or both	Class H KEEP OLD MAX FINE
49.141(9)(b)	Offering or paying a kickback, bribe or rebate in connection with providing items or services under W-2	Fine not more than $25,000 or imprisoned for not more than ***5 years*** or both	Class H KEEP OLD MAX FINE
49.141(10)(b)	Improper charging by a provider for W-2 services	Fine not more than $25,000 or imprisoned for not more than ***5 years*** or both	Class H KEEP OLD MAX FINE
49.49(1)(b)1.	Committing a fraudulent act in connection with providing items or services under medical assistance	Fine not more than $25,000 or imprisoned for not more than ***5 years*** or both	Class H KEEP OLD MAX FINE
49.49(2)(a)	Soliciting or receiving a kickback, bribe or rebate in connection with providing medical assistance	Fine not more than $25,000 or imprisoned for not more than ***5 years*** or both	Class H KEEP OLD MAX FINE
49.49(2)(b)	Offering or paying a kickback, bribe or rebate in connection with providing medical assistance	Fine not more than $25,000 or imprisoned for not more than ***5 years*** or both	Class H KEEP OLD MAX FINE
49.49(3)	Fraudulent certification of qualified medical assistance facilities	Fine not more than $25,000 or imprisoned not more than ***5 years*** or both	Class H KEEP OLD MAX FINE
49.49(3m)(b)	Improper charging by a provider for medical assistance services	Fine not more than $25,000 or imprisoned not more than ***5 years*** or both	Class H KEEP OLD MAX FINE
49.49(4)(b)	Improper charging by a facility for medical assistance services	Fine not more than $25,000 or imprisoned not more than ***5 years*** or both	Class H KEEP OLD MAX FINE

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A – I System
49.95(1)	Illegal intent to secure public assistance if the value exceeds $1,000 but does not exceed $2,500	Fine not more than $500 or imprisoned for not more than ***5 years*** or both	See sec. 49.95 in LRB Draft attached to this report.
49.95(1)	Illegal intent to secure public assistance if the value exceeds $2,500	Fine not more than $10,000 or imprisoned for not more than ***10 years*** or both (Class C felony)	See sec. 49.95 in LRB Draft attached to this report.
51.15(12)	False statement related to emergency mental health detentions	Fine not more than $5,000 or imprisoned not more than ***5 years***, or both	Class H
55.06(11)(am)	False statement related to protective services placements	Fine not more than $5,000 or imprisoned not more than ***5 years***, or both	Class H
66.4025(1)(b)	False statement related to securing or assisting in the securing of housing for persons of low income in order to receive at least $2,500 but not more than $25,000	Fine not more than $10,000 or imprisoned for not more than ***2 years*** or both	Class I
66.4025(1)(c)	False statement related to securing or assisting in the securing of housing for persons of low income in order to receive more than $25,000	Fine not more than $10,000 or imprisoned for not more than ***5 years*** or both	Class H
69.24(1)(intro)	Fraudulent or destroyed vital statistical record	Fine not more than $10,000 or imprisoned not more than ***2 years*** or both	Class I
70.47(18)(a)	Tampering with records of the Board of Review with intent to injure or defraud	Fine not more than $1,000 or imprisoned not more than ***2 years*** or both	Class I
71.83(2)(b)1.	False income tax return; fraud	Fine not to exceed $10,000 or imprisoned not to exceed ***5 years*** or both	Class H
71.83(2)(b)2.	Officer of a corporation; false franchise or income tax return	Fine not to exceed $10,000 or imprisoned not to exceed ***5 years*** or both, together with the cost of prosecution	Class H

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A – I System
71.83(2)(b)3.	Income tax evasion	Fine not more than $5,000 or imprisoned not more than ***3 years*** or both, together with the costs of prosecution	Class I
71.83(2)(b)4.	Fraudulent claim for tax credit	Fine not to exceed $10,000 or imprisoned not to exceed ***5 years*** or both, together with the cost of prosecution	Class H
86.192(4)	Tampering with road signs if the tampering results in the death of a person	Fine up to $10,000 or imprisoned not more than ***2 years***, or both	Class H (from I)
97.43(4)	Use of meat from dead or diseased animals	Fine not less than $500 nor more than $5,000 or imprisoned for not more than ***5 years*** or both	Class H
97.45(2)	Violation of horsemeat labeling requirements	Fine not less than $500 nor more than $5,000 or imprisoned for not more than ***5 years*** or both	Class H
100.17(7)(b)	Intentional violation of prize notification laws	Fine not more than $10,000 or imprisoned for not more than ***2 years*** or both	Class I
100.2095(6)(d)	Violations Relating to Labeling of Bedding	Fine not less than $100 nor more than $1,000 or imprisonment for not more than **1 year** or both.	Class A misd. penalties (9 mos. or $10,000 or both)
100.26(2)	Violation of commission merchant duties and responsibilities	Fine not less than $50 nor more than $3,000, or by imprisonment for not less than 30 days nor more than ***3 years***, or both	Class I
100.26(5)	Violations of dairy license requirements, DATCP orders or regulations and false advertising	Fine not less than $100 nor more than $1,000 or imprisoned for not more than ***one year*** or both	Class A misd. penalties (9 mos. or $10,000 or both)

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A – I System
100.26(7)	Fraudulent drug advertising	Fine not less than $500 nor more than $5,000 or imprisoned not more than ***one year*** or both for each offense	Class A misd. penalties (9 mos. or $10,000 or both)
101.143(10)(b)	Intentional destruction of a PECFA record	Fine not more than $10,000 or imprisoned for not more than ***10 years*** or both	Class G (from F)
101.94(8)(b)	Intentional violation of manufactured home laws that threaten health and safety	Fine not more than $1,000 or imprisoned not more than ***one year*** or both	Class A misd. penalties (9 mos. or $10,000 or both)
102.835(11)	Intent to evade collection of uninsured employer levies under the worker's compensation law	Fine not more than $5,000 or imprisoned for not more than ***3 years*** or both, and shall be liable to the state for the cost of prosecution	Class I
102.835(18)	Discharge or discrimination by employer against employe who has been the subject of a worker's compensation levy	Fine not more than $1,000 or imprisoned for not more than ***one year*** or both	Class A misd. penalties (9 mos. or $10,000 or both)
102.85(3)	Violation of an order to cease operation because of a lack of worker's compensation insurance	Fine not more than $10,000 or imprisoned for not more than ***2 years*** or both	Class I
108.225(11)	Evading collection of unemployment compensation levies under employment compensation law	Fine not more than $5,000 or imprisoned for not more than ***3 years*** or both	Class I
108.225(18)	Discharge or discrimination by employer against employe who has been the subject of an unemployment compensation levy	Fine not more than $1,000 or imprisoned for not more than ***one year*** or both	Class A misd. penalties (9 mos. or $10,000 or both)
114.20(18)(c)	False statement related to aircraft registration	Fine not more than $5,000 or imprisoned not more than ***5 years*** or both	Class H

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A – I System
125.075(2)	Injury or death by providing alcohol beverages to a minor	Fine not more than $10,000 or imprisoned for not more than ***5 years*** or both	Class H – if great bodily harm results Class G – if death results
125.085(3)(a)2.	Receiving money or other considerations for providing false proof of age	Fine not more than $10,000 or imprisoned for not more than ***2 years*** or both	Class I
125.105(2)(b)	Impersonating an agent, inspector or employe of DOR or DOJ in commission of a crime	Fine not more than $10,000 or imprisoned for not more than ***5 years*** or both	Class H
125.66(3)	Sale and manufacturing of liquor without permits	Fine not more than $10,000 or imprisonment for not more than ***10 years*** or both	Class F
125.68(12)(b)	Delivering alcohol from denatured alcohol	Fine not less than $1,000 nor more than $5,000 or imprisoned not less than one year nor more than ***10 years*** or both	Class F
125.68(12)(c)	Sale or disposal of denatured alcohol resulting in death	Imprisoned for not more than ***10 years***	Class E (from F)
132.20(2)	Trafficking in counterfeit trademarks and other commercial marks with intent to deceive	Fine not more than $250,000 or imprisoned for not more than ***5 years*** or both, or, if the person is not an individual, be fined not more than $1,000,000	Class H KEEP OLD MAX FINE
133.03(1)	Unlawful contracts or conspiracies in restraint of trade or commerce	Fine not more than $100,000 if a corporation, or, if any other person, $50,000, or be imprisoned for not more than ***5 years***, or both	Class H KEEP OLD MAX FINE
133.03(2)	Monopolization of any part of trade or commerce	Fine not more than $100,000 if a corporation, or, if any other person, $50,000, or be imprisoned for not more than ***5 years*** or both	Class H KEEP OLD MAX FINE

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A – I System
134.05(4)	Bribery of an agent, employe or servant	Fine of not less than $10 nor more than $500, or by such fine and by imprisonment for not more than ***one year***	Class A misd. penalties (9 mos. or $10,000 or both)
134.16	Fraudulently receiving deposits	Imprisoned in the Wisconsin state prisons not more ***than 10 years*** nor less than one yea***r*** or fined not more than $10,000	Class F
134.20(1)(intro)	Fraudulent issuance or use of warehouse receipts or bills of lading	Fine not more than $5,000 or imprisoned not more than ***5 years***, or both	Class H
134.205(4)	Issuance of warehouse receipts without entering item into register with intent to defraud	Fine not more than $5,000 or imprisoned not more than ***5 years***, or both	Class H
134.58	Unauthorized use of armed persons to protect persons or property or to suppress strikes	Fine not more than $1,000 or imprisoned not less than one year nor more than ***3 years*** or both	Class I
139.44(1)	Use or manufacturing of counterfeit cigarette stamps	Imprisonment not less than one year nor more than ***10 years***	Class G (from F)
139.44(1m)	Tampering with cigarette meter	Imprisoned not less than one year nor more than ***10 years***	Class G (from F)
139.44(2)	False or fraudulent report or attempts to evade the cigarette tax	Fine not less than $1,000 nor more than $5,000, or imprisoned not less than 90 days nor more than ***one year***, or both	Class A misd. penalties (9 mos. or $10,000 or both)
139.44(8)(c)	Unlawful possession of cigarettes if the number exceeds 36,000	Fine not more than $10,000 or imprisoned not more than ***2 years*** or both	Class I
139.95(2)	Possessing a schedule I or II controlled substance not bearing drug tax stamp	Fine not more than $10,000 or imprisoned not more than ***5 years*** or both	Class H
139.95(3)	False or fraudulent drug tax stamp	Fine not more than $10,000 or imprisoned not less than one yea***r*** nor more than ***10 years*** or both	Class F

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A – I System
146.345(3)	Sale of human organs for transplantation prohibited	Fine not more than $50,000 or imprisoned for not more than ***5 years*** or both	Class H KEEP OLD MAX FINE
146.35(5)	Female genital mutilation	Fine not more than $10,000 or imprisoned for not more than ***5 years*** or both	Class H
146.60(9)(am)	Second violation of failing to comply with notice of release of genetically engineered organisms into the environment requirements	Fine not less than $1,000 nor more than $50,000 or imprisoned for not more than ***one year*** or both	Class A misd. KEEP OLD MAX FINE
146.70(10)(a)	Filing of false 911 report	Fine not more than $10,000 or imprisoned not more than ***5 years*** or both for any other offense committed within 4 years after the first offense	Class H
154.15(2)	Falsification or withholding of information related to a declaration to a physician	Fine not more than $10,000 or imprisoned not more than ***10 years*** or both	Class F
154.29(2)	Falsification or withholding of information related to a do-not-resuscitate order	Fine not more than $10,000 or imprisoned for not more than ***10 years*** or both	Class F
166.20(11)(b)1.	Knowing and willful failure to report release of a hazardous substance, first offense	Fine not less than $100 nor more than $25,000 or imprisoned for not more than ***2 years*** or both	Class I KEEP OLD MAX FINE
166.20(11)(b)2.	Knowing and willful failure to report release of a hazardous substance, second and subsequent offenses	Fine not less than $200 nor more than $50,000 or imprisoned for not more than ***2 years*** or both	Class I KEEP OLD MAX FINE
167.10(9)(g)	Violation of fireworks manufacturing licensure requirement	Fine not more than $10,000 or imprisoned not more than ***10 years*** or both	Class G (from F)
175.20(3)	Violation of amusement place licensure requirements	Fine of not less than $25 and not more than $1,000, or by imprisonment for not less than 30 days in the county jail and not more than ***one year*** in the state prison, or by both such fine and imprisonment	Class A misd. penalties (9 mos. or $10,000 or both)

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A – I System
180.0129(2)	Filing of a false document with DFI, business corporation	Fine not more than $10,000 or imprisoned for not more than ***2 years*** or both	Class I
181.0129(2)	Filing of a false document with DFI, nonstock corporations	Imprisoned in the Wisconsin state prisons not more than ***3 years*** or in the county jail not more than ***one year*** or fined not more than $1,000	Class I
200.09(2)	Fraudulently obtaining or using a certificate of authority to issue any security by a public service corporation	Fine of not less than $500, or by imprisonment in the state prison not less than one or more than ***10 years***, or by both fine and imprisonment	Class I (from F)
185.825	Filing of a false document with DFI, cooperatives	Fine not more than $1,000 or imprisoned not more than ***3 years*** or both	Class I
214.93	Filing of a false document with the Division of Savings and Loans	Imprisoned for not more than ***20 years***	Class F (from D)
215.02(6)(b)	Illegal disclosure of information by employes of the Division of Savings and Loans	Fine not less than $100 nor more than $1,000, or imprisoned not less than 6 months nor more than ***2 years*** or both	Class I
215.12	Falsification of records and dishonest acts, savings and loans	Imprisoned in the Wisconsin state prisons for not to exceed ***20 years***	Class F (from D)
215.21(21)	Giving or accepting money for loans, savings and loans	Fine not to exceed $10,000 or imprisoned in the Wisconsin state prisons not to exceed ***2 years*** or both	Class I
218.21(7)	False statement related to a motor vehicle salvage dealer license	Fine not more than $5,000 or imprisoned not more than ***5 years*** or both	Class H
220.06(2)	Illegal disclosure of information by employes of the Division of Banking	Fine of not less than $100 nor more than $1,000, or imprisonment in the Wisconsin state prisons not less than 6 months nor more than ***2 years***, or both	Class I

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A – I System
221.0625(2) (intro)	Illegal loans to bank officials	Imprisoned for not more than ***10 years***	Class F
221.0636(2)	Theft by bank employe or officer	Imprisoned for not more than ***20 years***	Class H (from D)
221.0637(2)	Illegal commission to bank office and employes	Fine not more than $10,000 or imprisoned for not more than ***2 years*** or both	Class I
221.1004(2)	False statements related to records, reports and legal processes, state banks	Fine not less than $1,000 nor more than $5,000, or imprisoned not less than one year nor more than ***10 years***, or both	Class F
253.06(4)(b)	Fraudulent Practices re: State Supplemental Food Program for Women, Infants and Children (first offense)	Fine not more than $10,000 or imprisoned not more than **2 years** or both.	Class I
253.06(4)(b)	Fraudulent Practices re: State Supplemental Food Program for Women, Infants and Children (second or subsequent offense)	Fine not more than $10,000 or imprisonment not more than **5 years** or both.	Class H
285.87(2)(b)	Intentional violations of air pollution statutes and rules, second and subsequent convictions	Fine not more than $50,000 per day of violation or imprisonment for not more than ***2 years*** or both	Class I KEEP OLD MAX FINE
291.97(2)(b)	1. Transportation of hazardous waste to an unlicensed facility or site 2. Storage, treatment, transportation or disposal of any hazardous waste without a license	Fine not less than $1,000 nor more than $100,000 or imprisoned not more than ***5 years*** or both	Class H KEEP OLD MAX FINE
291.97(2)(c)1.	Second or subsequent violation of hazardous waste handling reporting requirements	Fine not less than $1,000 nor more than $50,000 or imprisoned not more than ***one year*** in state prison or both	Class I KEEP OLD MAX FINE
291.97(2)(c)2.	Second or subsequent violation of hazardous waste transportation, storage, treatment or disposal	Fine not less than $5,000 nor more than $150,000 or imprisoned not more than ***10 years*** or both	Class F KEEP OLD MAX FINE

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A – I System
299.53(4)(c)2.	False statement to DNR related to used oil facilities, second or subsequent violations	Fine not more than $50,000 or imprisonment for not more than ***2 years*** or both	Class I. KEEP OLD MAX FINE
302.095(2)	Illegal delivery of articles to inmates by prison or jail employes	Imprisoned for not more than ***2 years*** or fined not more than $500	Class I
341.605(3)	Unlawful transfer of license plates, insert tag, decal or other evidence of registration or the transfer of counterfeit, forged or fictitious license plates, insert tag, decal or other evidence of registration.	Fine not more than $5,000 or imprisoned not more than ***5 years*** or both	Class H
342.06(2)	False statement in an application for a vehicle title	Fine not more than $5,000 or imprisoned not more than ***5 years***, or both	Class H
342.065(4)(b)	Failing to obtain title for salvage vehicle, with intent to defraud	Fine not more than $5,000 or imprisoned not more than ***5 years***, or both	Class H
342.155(4)(b)	Violation of mileage disclosure requirements with intent to defraud	Fine not more than $5,000 or imprisoned not more than ***5 years***, or both	Class H
342.156(6)(b)	Transfers of leased vehicles, with intent to defraud	Fine not more than $5,000 or imprisoned not more than ***5 years***, or both	Class H
342.30(3)(a)	Alteration of vehicle identification number	Fine not more than $5,000 or imprisoned not more than ***5 years***, or both	Class H
342.32(3)	Counterfeiting and unlawful possession of certificate of title	Fine not more than $5,000 or imprisoned not more than ***5 years***, or both	Class H
343.44(2)(b) (as affected by 1997 Act 84)	Operating after Revocation of Operating Privilege or While Disqualified	Fine not more than $2,500 or imprisoned not more than **1 year**, or both.	Fine not more than $2,500 or imprisoned not more than 1 year **in the county jail,** or both.

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A – I System
344.48(2)	Forged proof of security for past accidents	Fine not more than $1,000 or imprisoned not more than ***one year*** or both	Class A misd. penalties (9 mos. or $10,000 or both)
346.17(3)(a)	Fleeing an officer	Fine not less than $300 nor more than $10,000 and may be imprisoned not more than ***2 years***	Class I A new Class A misd. Fleeing is being proposed.
346.17(3)(b)	Fleeing an officer resulting in bodily harm, or damage to property	Fine not less than $500 nor more than $10,000 and may be imprisoned not more than ***2 years***	Class H (from I)
346.17(3)(c)	Fleeing an officer resulting in great bodily harm	Fine not less than $600 nor more than $10,000 and may be imprisoned not more than ***2 years***	Class F (from I)
346.17(3)(d)	Fleeing an officer resulting in death	Fine not less than $600 nor more than $10,000 and may be imprisoned not more than ***5 years***	Class E (from H)
346.65(2)(e)	OWI – 5th or subsequent offense	Fine not less than $600 nor more than $2000 and imprisoned not less than 6 mos. nor more than ***5 years***	Class H KEEP MIN. FINE & MIN. MANDATORY 6 MOS. JAIL
346.65(5)	Negligent use of a vehicle causing great bodily harm	Fine not less than $600 nor more than $2,000 and may be imprisoned not less than 90 days nor more than ***18 months***	Class I .
346.74(5)(b)	Striking a person or attended or occupied vehicle and not remaining at the scene if the accident involves injury to a person but the person does not suffer great bodily harm	Fine not less than $300 nor more than $5,000 or imprisoned not less than 10 days nor more than ***one year*** or both	Class A misd. penalties (9 mos. or $10,000 or both)
346.74(5)(c)	Striking a person or attended or occupied vehicle and not remaining at the scene if the accident involves injury to a person and the person suffers great bodily harm	Fine not more than $10,000 or imprisoned not more than ***2 years*** or both	Class I

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A – I System
346.74(5)(d)	Striking a person or attended or occupied vehicle and not remaining at the scene if the accident involves death	Fine no more than $10,000 or imprisoned not more than ***5 years*** or both	Class H
350.11(2m)	Causing death or injury by interfering with snowmobile route or trail sign or standard	Fine not more than $10,000 or imprisoned for not more than ***2 years*** or both	Class H (from I)
446.07	Violation of Chiropractic Examining Board statutes	Fine not less than $100 nor more than $500 or imprisoned not more than ***one year*** or both	Class A misd. penalties (9 mos. or $10,000 or both)
447.09	Violation of Dental Examining Board statutes, second or subsequent offenses	Fine not more than $2,500 or imprisonment for not more than ***2 years*** or both for the 2nd or subsequent conviction within 5 years	Class I
450.11(9)(b)	Delivery or possession with intent to manufacture or deliver a prescription drug in violation of the Pharmacy Examining Board statutes	Fine not more than $10,000 or imprisoned not more than ***5 years*** or both	Class H
450.14(5)	Illegal delivery of poisons	Fine not less than $100 nor more than $1,000 or imprisoned not less than ***one year*** nor more than ***5 years*** or both	Class H
450.15(2)	Placing of prescription drugs: (a) in public place; or (b) upon private premises without consent of owner or occupant	Fine not less than $100 nor more than $1,000 or imprisoned not less than ***one year*** nor more than ***5 years*** or both	Class H
551.58(1)	Willful violation of securities law	Fine not more than $5,000 or imprisoned not more than ***5 years*** or both	Class H
552.19(1)	Willful violation of corporate take-over laws	Fine not more than $5,000 or imprisoned not more than ***5 years*** or both	Class H
553.52(1)	Willful violation of fraudulent and prohibited practices statutes under state franchise investment law	Fine not more than $5,000 or imprisoned for not more than ***5 years*** or both	Class G

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A – I System
553.52(2)	Fraud in connection with the offer or sale of any franchise	Fine not more than $5,000 or imprisoned for not more than ***5 years*** or both	Class G
562.13(3)	Facilitation of off-track wagering and possession of fraudulent wagering tickets with intent to defraud	Fine not more than $10,000 or imprisoned for not more than ***2 years*** or both	Class I
562.13(4)	Tampering with race animals; illegal killing of race dogs; counterfeiting race tickets with intent to defraud; illegal race activities	Fine not more than $10,000 or imprisoned for not more than ***5 years*** or both	Class H
565.50(2)	Forged or altered lottery ticket	Fine not more than $10,000 or imprisoned for not more than ***5 years*** or both	Class I (from H)
565.50(3)	Possession of forged or altered lottery ticket	Fine not more than $10,000 or imprisoned for not more than ***2 years*** or both	Class A misd. penalties (9 mos. or $10,000 or both) (from I)
601.64(4)	Intentional violation of any insurance statute or rule	Fine not more than $5,000 or imprisoned for not to exceed ***3 years*** or both	Class I
641.19(4)(a)	Willful violation or failure to comply with statutes or false statements related to employe welfare funds and plans	Fine not more than $5,000 or imprisoned not more than ***5 years*** or both	Class H
641.19(4)(b)	Willful and unlawful use of employe welfare funds	Fine not more than $10,000 or imprisoned not more than ***5 years*** or both	Class H
765.30(1)(intro)	Marriage outside state to circumvent state law	Fine not less than $200 nor more than $1,000, or imprisoned not more than ***one year***, or both	Class A misd. penalties (9 mos. or $10,000 or both)
765.30(2)(intro)	False marriage license statement; unlawful issuance of marriage license; false solemnization of marriage	Fine not less than $100 nor more than $1,000, or imprisoned not more than ***one year***, or both	Class A misd. penalties (9 mos. or $10,000 or both)

Statute	Offense	Current Penalty (prior to 1997 Act 283)	Proposed Class: A – I System
768.07	Violation of actions abolished statutes	Fine not less than $100 nor more than $1,000 or imprisoned for not more than ***one year***, or both	Class A misd. penalties (9 mos. or $10,000 or both)
783.07	Failure or neglect to respond to a writ of mandamus	Fine not more than $5,000 per officer or imprisonment for a term not exceeding ***5 years***	Class H
946.85(1)	Engaging in a continuing criminal enterprise	Imprisoned not less than 10 years nor more than ***20 years***, and fined not more than $10,000	Class E (from D)
968.31(1)(intro)	Illegal interception and disclosure of wire, electronic or oral communications	Fine not more than $10,000 or imprisoned for not more than ***5 years*** or both	Class H
968.34(3)	Illegal use of pen register or trap and trace device	Fine not more than $10,000 or imprisoned not more than ***one year*** or both	Class A misd. penalties (9 mos. or $10,000 or both)
968.43(3) [formerly 756.13(3), affected by Supreme Court Order 98-08]	Violation of an oath by a stenographic reporter or typewriter operator in connection with a grand jury	Imprisoned for not more than ***5 years***	Class H
977.06(2)(b)	False statement to qualify for assignment of a Public Defender	Fine not more than $10,000 or imprisoned for not more than ***5 years*** or both	Class I (from H)

H. Additional Recommendations

1. Attempts. As a general proposition Wisconsin law punishes attempts at one-half the maximum imprisonment and one-half the maximum fine for the completed crime.[280] There are a few exceptions to this general rule. For example, an attempt to commit a crime for which the punishment is life imprisonment is punishable as a Class B felony.[281] For a limited number of crimes, attempts are punished with the same maximum imprisonment and fine that apply to the completed offense.[282]

The Committee recommends that an attempt to commit a crime for which the penalty is life imprisonment (Class A felonies) be classified as a Class B felony. Further, as to those limited number of crimes for which the legislature has concluded that attempts ought to be punished at the same level as the completed crimes, the Committee does not recommend any change.

The Committee further recommends that the general rule for calculating the maximum punishment for attempts be maintained at one-half the maximum for the completed crime. In the interest of clarity, it suggests that the statute be amended to specifically provide that the maximum punishment for an attempt is as follows:

- One-half the maximum term of confinement for the completed offense
- One-half the maximum term of extended supervision for the completed offense
- One-half the fine for the completed offense

Adding the first two components together would equal one-half the maximum term of imprisonment for the completed offense because, under Act 283, the maximum term of confinement plus the maximum term of extended supervision equals the maximum term of imprisonment.

Application of the one-half multiplier to Class I felonies means that the punishment for an attempt to commit a Class I felony would be 9 months. This is the same maximum penalty that exists for a Class A misdemeanor. Accordingly, the Committee recommends that the statutes specifically provide that an attempt to commit a Class I felony is punishable as a Class A misdemeanor (9 months imprisonment or $10,000 fine or both).

Finally, the Committee recommends repeal of Wis. Stat. sec. 939.32(1)(b). This statute specifies that an attempt to commit battery to law enforcement officers, firefighters, probation agents, parole agents, extended supervision agents and aftercare

[280] Wis. Stat. sec. 939.32(1).
[281] Wis. Stat. sec. 939.32(1)(a).
[282] See, e.g., Wis. Stat. sec. 939.32(c)-(e).

agents is punishable as a Class A misdemeanor (9 months imprisonment). The Committee has proposed that these batteries be classified as Class H felonies (3 years maximum confinement followed by 3 years maximum extended supervision). An attempt to commit any one of these batteries ought to be punished using the general one-half formula (18 months maximum confinement followed by 18 months maximum extended supervision). The Class A misdemeanor penalties for these attempts under current law are too low. Law enforcement officers, firefighters, and the others mentioned ought to have the same protection from attempted battery as others who have special protection under the battery laws which the Committee recommends for classification at the H felony level (e.g., emergency department workers, emergency medical technicians, first responders, etc.[283]).

2. Maximum Term of Institutionalization for Persons Found Not Guilty by Reason of Mental Disease or Defect. Under present law the maximum term of institutionalization for persons found not guilty by reason of mental disease or defect (NGI acquittees) is set at two-thirds of the maximum sentence for the underlying offense (including any penalty enhancers).[284] If the underlying offense is punishable by life imprisonment, institutionalization may be for life, subject to termination as provided for by statute.[285]

When the legislature specified that institutionalization of NGI acquittees may not exceed 2/3rds of the maximum imprisonment for the underlying offense, it was obviously pegging maximum institutionalization for these individuals to the maximum an ordinary offender would serve in prison prior to being mandatorily paroled on a maximum sentence. With the advent of truth in sentencing and the abolition of parole, the Committee concluded that the period of maximum institutionalization should be adjusted accordingly. It recommends that the NGI statute be amended to provide that the maximum period of institutionalization for felonies not exceed the maximum term of confinement the court may impose for the underlying offense. The recommended maximum periods of institutionalization were therefore be as follows:

Class A felonies	Life
Class B felonies	40 years
Class C felonies	25 years
Class D felonies	15 years
Class E felonies	10 years
Class F felonies	7.5 years
Class G felonies	5 years
Class H felonies	3 years
Class I felonies	18 months

[283] See Wis. Stat. sec. 940.20(7).
[284] Wis. Stat. sec. 971.17(1).
[285] Wis. Stat. sec. 971.17(1).

There is no recommendation to change the 2/3rds formula for misdemeanants. Nor is there a recommendation to change the statute addressing the interaction of NGI commitments with court orders for lifetime supervision of serious sex offenders.[286]

3. Bifurcated Sentences for Misdemeanants Sentenced to State Prison. There is serious doubt whether Act 283's requirement that felons sentenced to prison receive bifurcated sentences also applies to misdemeanants sentenced to prison. The Committee has concluded that if a misdemeanant is dangerous enough and/or has committed offenses serious enough to warrant incarceration in prison, then that individual should receive a bifurcated sentence that includes both a term of incarceration and a term of extended supervision. The same philosophy of managed supervision upon release from prison that applies to convicted felons supports application of extended supervision to dangerous misdemeanants as well.

Accordingly, the Committee recommends that the relevant statutes be amended to require bifurcated sentences for all misdemeanants sentenced to prison and to further require that the extended supervision component of these sentences be at least 25% of the amount of confinement ordered by the court.

I. Concurrent and Consecutive Sentencing When Offender Has Both Old World and New World Convictions

Convictions for crimes committed before and after the December 31, 1999 effective date of Truth-in-Sentencing will be sentenced differently. If the offender committed the crime on or before December 30, 1999, the offender will receive an "old world" indeterminate sentence. If the offender committed the crime on or after December 31, 1999, the offender will receive a "new world" determinate sentence.

If the same offender commits crimes, one on each side of the effective date, the law needs a mechanism which governs the service of sentences for those crimes, whether concurrent or consecutive. The Committee recommends that in either sequence (indeterminate sentence followed by determinate sentence, or determinate followed by indeterminate), and regardless of whether the sentences are run concurrent with or consecutive to each other, all confinement time should be served together, either concurrently or consecutively in whatever sequence ordered by the courts; and extended supervision should always precede any parole time. This recommendation is based in the Committee's conclusion that ES supervision will involve stricter community supervision than currently available through parole.

[286] See Wis. Stat. sec. 971.17(1j).

J. Legislative Charge to Consolidate All Felonies Into a Single Criminal Code

The legislature charged the Committee to consolidate all felonies into a single criminal code.[287] The Committee strongly opposes this change for numerous reasons and respectfully urges the legislature to reconsider it. Among the reasons for its opposition are the following:

- Approximately 220 felonies are codified in various chapters of the Wisconsin Statutes other than in the Criminal Code. They are logically related to the subject matter of the various statutory chapters and for ease of access should remain where they are. To remove the crimes from their related substantive law provisions would promote needless confusion among the lawyers, judges, legislators and others who must use these laws and would require searching in multiple places to locate statutes dealing with the same subject matter. To prevent this from happening, drug offenses should remain within the Uniform Controlled Substances Act; natural resources crimes should remain with other natural resources statutes; traffic crimes should remain in the Vehicle Code; securities crimes should remain with other securities laws, etc.

- Act 283 speaks only in terms of relocating all non-Criminal Code felonies to the Criminal Code. Thus, misdemeanors would remain scattered throughout the statutes while felonies would be in the Criminal Code, even if those felonies and misdemeanors dealt with related subject matter.

- Drug laws, which constitute some of the most commonly utilized statutes, are currently codified together in the Uniform Controlled Substances Act (Wis. Stat. ch. 961). This act is a relatively self-contained drug code for the State of Wisconsin. Beyond the complex set of crimes codified therein, it has its own declaration of legislative intent, its own extensive set of definitions, and its own unique structure of crimes. To engraft the drug code upon the Criminal Code without a general recodification effort involving the careful integration of both (assuming that would be desirable) would do little, if anything, to promote statutory clarity and ease of use. Rather, it would pose a substantial risk of unnecessarily confounding what are already complex and difficult chapters of the Wisconsin Statutes.

[287] 1997 Wis. Act 283 sec. 454(1)(e)3.

If the legislature truly wants all Wisconsin felonies located in a single criminal code that contains a unified and principled codification of the state's criminal laws presented in a structurally sound set of statutes, then it must undertake a massive recodification effort to achieve those results. The last time such a project was undertaken, it took over five years to complete and dealt only with the subject matter now contained in the Criminal Code.[288] To expand the horizons of recodification to include the hundreds of offenses located other than in the Criminal Code would involve instituting a project of enormous proportions. And, for the reasons stated above, the Committee does not view the centralization of all crimes in one code as being either necessary or desirable.

The kind of recodification effort described in the preceding paragraphs was not within the charges given to the Committee by the legislature and, given the Committee's other substantial assignments which had to be accomplished within challenging time limits, any such undertaking would have been well beyond its capacity.

K. Subjects for Further Study

During the course of its work, the Code Reclassification Subcommittee, which had responsibility for the subject matter described in Part II of this report, discovered several problematic aspects of Wisconsin's criminal laws that need to be remedied after further investigation by the legislature. These include statutes dealing with abortion, special circumstances batteries, abuse and neglect of residents of certain facilities, criminal damage to property under special circumstances, and others. During the course of classifying drug offenses, that same subcommittee also came to perceive the need for a comprehensive review of the policies of this state which deal with the enforcement of these laws, the punishment for those who are convicted thereunder, and the treatment of violators who are truly addicted.

The Code Reclassification Subcommittee presented these problems to the whole Committee, which has included a discussion of them in Part VIII of this report.

[288] See 1955 Wis. Laws 656.

PART III

TEMPORARY ADVISORY SENTENCING GUIDELINES

Statutory charge:

"e. Development of temporary advisory sentencing guidelines for use by judges when imposing a bifurcated sentence."[289]

A. Introduction and Overview

Perhaps the most difficult question this Committee faced was the choice of a sentencing guideline system. The Sentencing Guidelines Subcommittee, as well as the full Committee, had long and difficult discussions about the format sentencing guidelines should take for Wisconsin's "new world" of Truth-in-Sentencing. As it studied this problem, the Committee knew that given the new determinate sentencing system,[290] all actors in the criminal justice system, but especially judges who will be making essentially irrevocable decisions on sentence lengths, will need guidance as to proper sentences in this "new world."

B. Study of Other States' Sentencing Guidance Systems

The full Committee studied the sentencing guidance systems of several states and the federal system, each of which has implemented Truth-in-Sentencing, as well as the former Wisconsin sentencing guidelines. Given the full Committee's quick deadline to issue its final report, other states' systems were examined closely to determine if any one stood out as an attractive option to import into Wisconsin.

Committee members noted the following regarding those other systems:

North Carolina – mandatory guidelines using grid with 54 cells

Strengths – 1) prison population and cost projection capabilities
2) emphasis on community corrections for lower-end felonies
3) use of intermediate sanctions as an alternative to prison

Weaknesses – 1) less flexibility for judges, prosecutors, and defendants than Wisconsin desires
2) incompatible with 1997 Wis. Act 283 mandate that guidelines be "advisory"

[289] See 1997 Wis. Act 283 sec. 454(1)(e)5.
[290] See p. 4.

3) some discomfort with community corrections as a possibility for punishment for serious/violent felonies

Virginia – voluntary guidelines using grid with 6 to 11 cells

Strengths – 1) voluntary nature of grid
2) although voluntary, achieved 75% compliance by mandating that a report form be filled out at sentencing
3) strong program of educating the public through handouts
4) card given to offender exiting system listing penalties if offender re-offends
5) allows release of elderly, unhealthy prisoners if they pose no risk to the community

Weaknesses -- 1) risk of reoffense calculation was controversial
2) midpoint sentence enhancements for violent felonies were controversial
3) recommendation of imprisonment for longer period of time for younger offenders was controversial
4) VA will bear great corrections expenses in the coming decades due to longer sentences

Delaware – voluntary guidelines; does not use a grid, but certain crimes have presumptive sentence lengths in certain types of institutions

Strengths -- 1) by tying the level of supervision of offenders to their behavior, "good" actors are transferred into less expensive incarceration modes more quickly

Weaknesses -- 1) difficult to translate system from such a small state to Wisconsin
2) complexity of system
3) felony-class based rather than offense based

Ohio – mandatory narrative guidance without a grid

Strengths – 1) narrative questions posed by the judge were more particular/useful than other such questions studied
2) non-grid approach does not "reduce an offender to numbers"

Weaknesses – 1) elaborateness of system could result in it taking too long to sentence in an average case
2) sentence ranges for serious/violent felonies could be insufficient to protect public safety
3) recidivist calculation too complex

Federal – mandatory guidelines using grid with 258 cells

Strengths -- 1) accurate prison population and cost projection capabilities

Weaknesses – 1) less flexibility for judges, prosecutors, and defendants than Wisconsin desires
2) incompatible with 1997 Wis. Act 283 mandate that guidelines be "advisory"
3) too complex
4) grid approach "reduced an offender to numbers"
5) those intimately familiar with the system objected to its adoption for reasons 3) and 4), among others

Former Wisconsin – advisory guidelines using a grid with 6 to 16 cells

Strengths -- 1) strong foundation in historical research
2) judiciary's familiarity with framework
3) offense-based system

Weaknesses -- 1) perceived as "least common denominator" approach
2) comments from those who used the former guidelines that even in 1995, when they ceased to be used, sentencing ranges were too low

C. Conversion Table

The Committee developed a conversion table, the purpose of which is to numerically convert “old world” indeterminate sentences to “new world” Truth-in-Sentencing determinate sentencing ranges.[291]

On the back of this table, information was provided converting old indeterminate sentences to new Truth-in-Sentencing determinate sentences based on the average prison time served to first release for (a) assaultive, (b) sexual assaultive, (c) drug, and (d) property/other crime categories. The time served percentages are based on very broad crime categories[292] to give judges an idea where new world determinate sentences could fall based on judges’ knowledge of “old world” indeterminate sentence lengths.

The four categories listed each consolidate numerous and disparate types of felonies. The percentage of time served at the top of each column represents an average over 7 years of prison time served for all of the felonies in that category. Thus, the sentence listed is merely an example of what an average Truth-in-Sentencing-converted sentence could be for an average felony in that category. Some concern was expressed with the conversion table’s use of averages from broad crime categories. Each of the four categories incorporates many crimes. Therefore, the percentage shown for each category

[291] A copy of the conversion table is at Appendix D.
[292] These percentages were also based on the most detailed Department of Corrections data available.

distorts low the prison time served for the most serious crimes in each category, and distorts high the prison time served for the least serious crimes in each category.

It should be noted that the former Wisconsin Sentencing Commission, with a staff of 5 people, took 11 years to developed 16 sentencing guidelines. Time constraints have limited this Committee to developing guidelines for the 11 crimes which consume approximately 72% of those corrections resources devoted to prisoners. The conversion table the Committee developed may be used in sentencing for all other crimes committed on or after December 31, 1999 until the Sentencing Commission develops additional and permanent sentencing guidelines.

D. Goals of Sentencing Guidelines Format

None of the systems studied garnered enough support for the Committee to recommend that Wisconsin adopt it. Instead, the Committee decided to formulate a new advisory guidelines format. The format developed is unique – no other state has attempted to do what Wisconsin has done with these guidelines.

The Committee discussed its goals for a sentencing guidelines system. Among those articulated were: (1) ensuring public safety; (2) achieving fairness; (3) preserving judicial sentencing discretion; (4) preserving individualized sentencing; (5) achieving proportionality in sentencing statewide, especially given the abolition of parole;[293] and (6) achieving a greater level of predictability, so that the governor, the legislature, and the DOC may identify and plan for resource requirements, including cost.

The Committee determined that it did not want any sentencing guidelines system to undermine: (1) the independence of the judiciary by removing from the judiciary any key decisionmaking authority; or (2) the community's sense of the proper punishment for a crime.

E. Particular Issues Discussed

The Committee discussed numerous particular issues as it considered various sentencing guideline formats.

The Committee considered at length the merits and demerits of **"grid" versus "non-grid"** guidelines formats. A grid system would incorporate a graph with two axes upon which offender risk (horizontal axis) and offense severity (vertical axis) are

[293] Under Truth-in-Sentencing, all of the sentencing discretion will be at the front end of the process in the hands of the judge, rather than part of it at the back end of the process being shared between the Parole Commission and the DOC. With the abolition of parole and other forms of early release, proportionality will have to be achieved by proper classification of crimes – "vertical" proportionality, in that crimes are in properly descending order, most serious to least serious – as well as by the implementation of appropriate sentencing guidelines – "horizontal" proportionality, which will produce comparable sentence lengths for comparable crimes statewide.

measured. A non-grid system would ask a series of narrative questions to guide the judge's sentencing logic.

All members agreed on the **necessity to preserve advocacy** in the sentencing process. Advocacy humanizes victims, as well as the defendant, and elucidates offense characteristics necessary to make the best sentencing decision. Accordingly, where possible, the guidelines format raised particular questions for the judge's consideration, and for litigants to use in advocating their client's position before the judge.

The Committee wanted the guideline format and any accompanying documents to provide **valuable information** to the sentencing judge and to the litigants. More than a checklist, the guideline format ought to bring before the judge and litigants key issues and topics to be covered such that the sentencing exercise will be more accurate and productive for all involved.

The Committee discussed the issue of how the guidelines format should consider **concurrent versus consecutive sentences**. Rather than attempt to include such calculations, the Committee decided to let this issue be handled as it was under the former Wisconsin sentencing guidelines: a separate calculation would be made for each count, and the judge would use discretion to decide whether the sentences for those counts should be served concurrently with or consecutively to each other.

Concern was expressed that if **non-violent misdemeanors** were included in sections II-C-2 (medium risk) and II-C-3 (high risk) of the criminal history calculation in the worksheets, it would result in an undue impact on racial minorities, as historically misdemeanor cases might go forward against residents of the City of Milwaukee, while those same cases would be handled as non-criminal municipal ordinance violations in that city's suburbs. Accordingly, non-violent misdemeanors were not included in the criminal history calculation in the guideline worksheet in those sections the offender risk assessment.

Appellate review was also discussed. There was little sentiment on the Committee to recommend a change in current law and practice.

Whether and how much **guidance to give for extended supervision** was also discussed. Act 283 provides that the period of ES must be equal to at least 25% of the confinement period in the sentence. Given the potential contingent prison liability of long periods of ES, the Committee discussed whether each guideline should include recommended ES ranges. But because the characteristics of each offender and each offense will differ greatly, the Committee decided not to recommend a standard or presumptive term of ES, and instead leave it to the sentencing judge's discretion.

F. Different Guideline Formats Discussed

The Committee considered different proposals for this sentencing guidelines format, including the following:

1. "Rule-of-Law" Sentencing Guidance

The supporters of this proposal pointed to public safety as the overriding principle underlying felony sentencing. This approach asks the judge to determine what version of the crime the offender committed (for example, what type of burglary had been committed – professional, retaliatory, opportunistic, or thrill-seeking?). The answer to this question is relevant to public protection and punishment deserved. The judge is to look at certain relevant facts and circumstances. These would include facts about the offense – e.g., what type of premises was burgled? – as well as facts about the victim – e.g., was the victim a vulnerable person, and was the victim known to the perpetrator to be vulnerable? These facts will affect what punishment is deserved, and what future risk the offender may be.

The judge would also examine facts about the offender's character and behavior. Initially, the judge would look at prior crimes and bad acts. Under this proposal, the judge would be told that prior offenses may render an offender more deserving of punishment for the current crime, but the judge would be required to look at the type of prior offense. This proposal sought to have the judge engage in a reasoning process about prior convictions to see what is relevant to the present offense and what is not.

Other factors the judge would consider include the offender's legal status (on probation or parole) at the time of the crime, the offender's age, and his employment and family status. This proposal would consider aggravating and mitigating circumstances, but not label them as such, on the theory that some circumstances can be aggravating in one context and mitigating in another. Rather, this approach would instruct the judge to weigh the itemized circumstances of the crime by asking two fundamental questions: (1) Can the sentence contain the risks posed by the offender's return to the community?, and (2) Can punishment deserved by this offender be effective within the community? If the answer to both questions is "no," the judge must sentence the individual to prison within the range provided. A judge may depart upward or downward from the stated range if the judge, in analyzing these factors, determines that a sentence outside the guideline range is warranted.

Some members thought the benefits to this proposal were that it tells litigants in advance what information to present to the judge, gives guidance to the judge about how to use the information, directs the judge to fashion a sentence based on current case law requiring that the least restrictive form of punishment be used, and it avoids the use of a grid. This lack of a grid was the essential difference between this and the other approaches. Supporters of this proposal felt that scoring prior crimes was deceptive and under-punished those offenders who deserved greater punishment because they did not have a prior bad act or prior crime, and over-punished those offenders whose prior bad acts or crimes were not related to this particular crime.

Critics of this proposal found it amorphous, and that its use could lead to contradictory results for similarly situated offenders. They saw this proposal having no

ability to predict corrections numbers or resources. They also thought the format was too long and unwieldy. Also, they thought that a defendant's race could become a factor if an offender's prior record was not considered in an objective manner. If the judge was not given an objective indication of what criminal history should result in what level of punishment, that judge could use any excuse to punish a defendant of one race one way and a defendant of another race in another way. Another concern with this approach was the lack of guidance the question "What type of burglary was this?"actually provides.

2. Former Wisconsin Sentencing Guidelines with Monthly Ranges Adjusted for Time-Served

Another proposal offered was based on the theory that actual prison time served under indeterminate sentencing should equal Truth-in-Sentencing. Under this proposal, the former Wisconsin sentencing guidelines would be adopted in all respects except for the numbers contained in the cells in the guideline matrix. Those monthly ranges would be converted to actual time served in prison. As sentence lengths increased, the percentage of the sentence actually served increased. Those increasing percentages of time-served would be multiplied by the increasing sentences in the matrix to give truthful ranges to be used.

Proponents of this proposal thought it would be truthful and would direct judges to mete out sentences in the new determinate system equal to the time periods which offenders actually served under indeterminate sentencing. Supporters also thought this proposal had a statistical foundation in the former Wisconsin sentencing guidelines, with which judges and lawyers may still be familiar. Further, if this approach to guidelines is followed, and if judges adhered to the guidelines, neither the number of prisoners nor costs would increase any more than they would have before Truth-in-Sentencing was enacted. This proposal continued to recognize that prior record and offense severity were the two key factors that made a statistical difference in all sentences studied over many years and influenced thousands of sentences. The former Wisconsin sentencing guidelines also allowed for consideration of aggravating and mitigating factors related to the crime and the offender.

Critics of this proposal noted that the data relied upon in the former Wisconsin guidelines was 5 years old, and sometimes older, at the time work ceased on these guidelines in 1995. Also, many of the people in the criminal justice system who used the former guidelines said that since the ranges were based on old data, significant adjustments to the sentence ranges would be necessary. Other detractors thought that the grid did not sufficiently take into account an offender's circumstances. The grid created a starting point into which an individual is automatically plugged; for any negotiation, that starting point could inflate sentence lengths.

3. "Merged" Approach

An approach drawing on the strengths of both the Rule-of-Law approach and the former Wisconsin guidelines was also considered. This proposal attempted to maintain

some of the benefits of a grid guideline system (proportionality, predictability, neutrality) while preserving individualized sentencing and judicial discretion. The main objective of this proposal was to produce a clear starting point based upon criminal history, which is generally regarded as a reliable predictor of recidivism. In addition to the objective treatment of criminal history, this approach directed the judge to evaluate the severity of the offense, as well as various itemized aggravating and mitigating factors. Some of these factors would be general in nature, and some would be crime-specific.

This proposal originally retained a version of criminal-history scoring from the former Wisconsin guidelines (the horizontal axis), but with some substantial differences. Unlike the former guidelines, this proposal contained no offense severity scoring (the vertical axis); rather, it categorized the offense as aggravated, intermediate, or mitigated. Finding the intersection of the two axes would give the judge a starting point with a range of prison or probation. The judge would proceed from this range to the aggravating and mitigating factors, both general and crime-specific, and arrive at a sentence particular to the offender but also proportionate to similarly situated offenders statewide.

Supporters of this proposal thought it gave the judge and the litigants some idea as to where a judge is likely to start the sentencing analysis. This would allow litigants to structure their arguments accordingly. Critics felt that the criminal history scoring lent an improper scientific caste to past criminal history, and overweighed that factor in assessing an offender's risk.

G. Decision on Sentencing Guideline Format

The Committee discussed these various proposals at length. The Committee approached the choice of a guideline format as an evolutionary process. The Committee attempted to incorporate some of the aspects of each of the proposals. Ultimately, the committee decided to recommend a two-page **worksheet**[294] for 11 offenses with accompanying **notes**.[295]

The worksheet was drafted such that before sentencing, the presentence writer or a person designated by the judge could fill out all but one section.

In Section I of the worksheet, **offense severity** is assessed. The judge is directed to consider: (a) factors affecting the severity of the crime, (b) the harm caused by the offense, (c) the offender's role in the offense, (d) statutory sentencing aggravators and penalty enhancers, and brings to the courts attention (e) other factors relating to offense severity. A crime's severity is ranked as mitigated, intermediate, and aggravated. This assessment includes penalty enhancers, statutory aggravating factors, non-statutory aggravating and mitigating factors, as well as crime-specific factors.[296]

[294] See Appendix E.
[295] See Appendix F.
[296] See p. 59.

In Section II of the worksheet, an offender's **risk assessment** is evaluated. The judge is directed to consider: (a) factors that may suggest heightened or lesser risk of future criminal conduct, including prior acts (whether or not convictions or adjudications), the offender's age, employment, character, family/community ties, alcohol/drug dependency, drug treatment, and performance on bail; and (b) the offender's criminal convictions or juvenile adjudications which, if present in various specified combinations, should generally result in placement of the offender in a specified risk range. Criminal history should be assessed with caution, and the judge is to consider whether prior criminal convictions fairly reflect risk to public safety or risk of re-offending. The worksheet poses normative questions concerning an offender's prior criminal history as a guide toward certain risk levels. It also asks litigants to identify and evaluate factors that bear upon the offender's future risk to public safety and directs the judge to determine which factors are relevant. At the end of this Section, the judge is asked to consider whether the score improperly understates or overstates the offender's future risk to public safety. Offender risk assessment is ranked lesser, medium, and high. The format was altered to remove numerical criminal history scoring in favor of a narrative approach. The lesser, medium, and high risk ranges roughly approximate the types of offenders judges encounter. A judge may decide for a variety of reasons to move a defendant out of a generally specified range if the judge concludes that the risk assessment does not accurately reflect the offender's circumstances.

In Section III of the worksheet, the judge consults a **9-cell graph** where these two assessments intersect. This gives the judge an advisory starting point from which to begin to sentence the offender. The percentage of offenders placed on probation for this offense over the last 5 years is listed. The concept of extended supervision is addressed below the chart.

The worksheet also directs the judge to consider additional important factors which may warrant adjustment of the sentence, such as uncharged read-in offenses, acceptance of responsibility, attorneys' recommendations, restitution paid at great sacrifice before sentencing, the effect of multiple counts, and whether the defendant is a habitual criminal.

Along with the worksheet, the Guidelines Subcommittee has drafted detailed **notes**[297] that elucidate for judges and litigants many of the considerations and concepts underlying the questions posed on the worksheet.

This format has the strengths of assessing offender risk using a variety of factors, including criminal history, and employing narrative questions which guide the judge's sentencing reasoning. The guideline system is not overly complex, so it is capable of being used in a high-volume felony court. Further, the use of a graph will allow for some corrections population and cost projection capabilities. This middle-ground approach addresses the concerns described above about the use of a purely narrative approach, such as the Rule-of-law proposal, as well as a purely numerical approach, such as the former Wisconsin sentencing guidelines.

[297] Appendix F.

As directed by 1997 Wis. Act 283 sec. 454(e) 4-5, this format maintains the advisory nature of sentencing guidelines for the flexibility of judges and litigants.

H. Monthly Ranges for the Graphs in the Guidelines

On June 11, 1999, 18 experienced circuit judges from different areas of the state gathered in Madison to discuss determinate sentencing and to help formulate sentence ranges for use in the temporary advisory sentencing guidelines to be recommended by this Committee. The meeting was facilitated by former Wisconsin Supreme Court Justice Janine Geske, herself a circuit judge for many years before being appointed to the Supreme Court.

At the meeting, the judges identified the general characteristics of low-risk, medium-risk and high-risk offenders, and the mitigated, intermediate and aggravated forms of the 11 major crimes which consume the vast majority – 72% – of those corrections resources devoted to prisoners. Those crimes are:

1. **Burglary**
2. **Theft**
3. **Forgery/Uttering**
4. **Robbery**
5. **Armed Robbery**
6. **Possession of Controlled Substance With Intent to Deliver Cocaine – 1 gram or less**[298]
7. **Possession of Controlled Substance With Intent to Deliver Marijuana – 200-1000 grams** [299]
8. **1st Degree Sexual Assault**
9. **1st Degree Sexual Assault of a Child**
10. **2nd Degree Sexual Assault**
11. **2nd Degree Sexual Assault of a Child**

The statutory maximums recommended by the Code Reclassification Subcommittee were used. At the survey the judges compiled a list of offender and offense characteristics for each crime. These lists became valuable as the full Committee reviewed the sentencing ranges which the survey produced. While there was not always universal agreement – e.g., some judges thought an addiction was an aggravating factor, others thought it was a mitigating factor – judges agreed on almost all of the indicia of a offender's risk and an offense's severity for each crime.

After first discussing the characteristics of each crime, the judges wrote ranges of punishment into each cell of a 9-cell graph to be inserted into whichever guideline format the Committee ultimately chose. For each crime, Justice Geske led a discussion among the judges as to what ranges they placed in which cells and why. Judges were

[298] The Committee proposes this new crime. See p. 76.
[299] The Committee proposes this new crime. See p. 76.

encouraged to rethink the ranges, and then submitted these draft graphs for tabulation by Committee staff.

Medians were used to calculate minimum and maximum numbers for each of the cells in the graphs. There was horizontal and vertical overlap between the ranges in the cells: e.g., the highest number in the cell for a low-risk offender, committing a mitigated version of an offense, would be higher than the lowest number for a medium-risk offender committing the same version of the same offense. Also, the judges were surveyed as to whether or not they would recommend that the standard term of extended supervision be presumptively set at 25% of the confinement term. The judges' responses to that inquiry was overwhelmingly "no." Most judges thought that the amount of ES time should vary based upon the offender's risk.

Topics of discussion among the judges at the meeting included how many cells should include probation as the lower number in the range in the cell, and whether or not the maximum term for each crime should be included in the last cell in the graph. The judges who participated in the survey worked hard and patiently in order to come up with sound, middle-of-the-road ranges for the cells in the graphs for the various crimes.

The draft graphs were the topic of discussion at three separate Sentencing Guidelines Subcommittee meetings. A symmetry emerged in the monthly ranges in the cells. For each crime, the median low was probation, and the median high was the statutory maximum. For most crimes, for a low-risk offender committing an aggravated version of an offense, a range of punishment was given identical to a range of punishment for a medium-risk offender committing an intermediate version of the same offense. Also, judges tended to give a higher sentence to an offender with an extended criminal history even though the offender had committed a more mitigated version of an offense, in contrast to a first-time offender or low-risk offender who had committed the most aggravated form of an offense.

The consensus among all who worked with the monthly ranges was that they wished to see relatively broad ranges in each cell to maintain flexibility.

The former Wisconsin Sentencing Guidelines' monthly ranges for the same 11 crimes were also adjusted for the time period actually served. Those ranges were then reviewed by the Guidelines Subcommittee, but the resulting monthly ranges were so low as to cause concern among some members that the ranges were insufficiently punitive and would not adequately protect the public. Ultimately, the Guidelines Subcommittee rejected their use in the graphs.

For the Committee's work to be credible, it was concluded that the cell for the high-risk offenders committing the most severe version of the crime had to include the statutory maximum time in prison, and that the cell for the least-risky offenders committing the most mitigated version of the crime had to incorporate the statutory minimum of 1 year in prison.

The approach used at the Madison meeting was not without its critics. A judge filling in the graphs might be doing different things: sentencing as he or she would normally sentence an offender, or setting up ranges of guidelines for judges to use when sentencing. However, judges were told to draw on their experience sentencing a variety of offenders who had committed these offenses in their various permutations. The judges who participated in the survey thought they were applying their judgments as to the proper sentence range for each cell. The judges paid attention to the minimum in each cell, as they recognized the practical realities of sentencing decisionmaking.

This approach did not purport to be a scientific process. Rather, it was an attempt to get a general reaction from experienced judges from around the state as to what ranges they would like to see in a graph such as the Committee recommends. The indicia of each cell, both offender risk and offense severity, were scrutinized, and judges were encouraged, after they initially filled out the graph, to change the numbers they inserted if they changed their minds after group discussion of the numbers.

The survey demonstrated a fair amount of agreement among judges, even from different places in the state and different points of view, as to how like offenders committing the same offense should be treated. Because the sentencing guidelines are ultimately advisory, judges will be free to move among the ranges based upon the facts and circumstances of each offense and offender.

It is important to note that the former Wisconsin Sentencing Commission with a staff of 5 persons took 11 years to develop 16 sentencing guidelines. Time constraints have limited this Committee to developing sentencing guidelines for the 11 crimes which consume the greatest amount of corrections resources devoted to prisoners – approximately 72%. The conversion table should be used during "new world" sentencing of all other crimes. Given time and resource constraints, the Committee could not validate either the sentencing guidelines worksheets or the monthly ranges in the graphs.

I. Penalty Enhancers and Statutory Aggravators

As discussed above at pp. 59-63, the Committee recommends that certain penalty enhancers be retained, others be repealed, and still others be transformed into statutory aggravators to be considered at the time of sentencing.

The guideline worksheets and notes includes sections in which it is suggested how a should consider penalty enhancers (whether pleaded and proved, uncharged, or dismissed) and former penalty enhancers now considered statutory sentencing aggravators. See Appendix E, Section I.D.; Appendix F, Section I.D.

PART IV

THE SENTENCING COMMISSION

Statutory charge:

"d. Creation of a sentencing commission to promulgate advisory sentencing guidelines for use by judges when imposing a bifurcated sentence."[300]

As this Committee studied criminal penalties, it became clear that the various criminal justice and corrections agencies and departments within state government speak with each other little if at all. Often the left hand does not know what the right hand is doing. Even if one agency is aware of the activities of another, that entity's computer system is not compatible with any other entity. This state of affairs prevents the agencies from working together to solve problems that cross departments or agencies.

The Committee envisions a Sentencing Commission as a large, broad-based group that will review sentencing policy for the state. The Sentencing Commission should act as a link among various state criminal justice agencies, and as a bridge between the legislature and the Department of Corrections ("DOC"), as together they try to solve criminal justice issues. The Sentencing Commission also should have a research role.

A. Justification for Sentencing Commission

Even if there was no legislative mandate for a Sentencing Commission, the creation of such a commission is desirable for a number of reasons:

a. Truth-in-Sentencing significantly increases judicial responsibility to sentence fairly and for the appropriate length of time because of the elimination of parole which has functioned in the past as a safety valve in ameliorating unduly harsh or severe sentences. A Sentencing Commission can be of assistance to sentencing judges by suggesting sentence standards through sentencing guidelines.

b. Presently, judges sentence with little knowledge of empirical studies of the effectiveness of one kind of sentence versus another, or the indicia of dangerousness of an offender, or of the effectiveness and availability of treatment programs. A Sentencing Commission can monitor sentences, carry out sentencing studies, collect data and publish information relating to the effectiveness of sentencing options.

c. This Committee found that there is a paucity of sentencing data for Wisconsin courts, that what data there is, is not reliable or organized in such a way as to provide useful information concerning sentencing practices, and that there is no electronic

[300] See 1997 Wis. Act 283 sec. 454(1)(e)4.

transfer of data between the court system and DOC, each of which had data the other would find useful. Further, there is little or sporadic communication among the court system, the prosecution, the public defenders and DOC regarding the effectiveness of sentences. A Sentencing Commission can act as a bridge among prosecutors, public defenders, the courts, and DOC to promote a more rational and coherent approach to the sentencing of criminals.

d. This Committee found the prediction of future probation, parole, and prison populations as presently forecasted to be a surprisingly unsophisticated process. A Sentencing Commission can assist the governor and legislature by more accurately predicting prison and probation populations for budgeting purposes through its utilization of both the CCAP ("Circuit Court Automation Project") and DOC data bases.

e. Frequently, the legislature feels pressure to pass criminal penalty laws in response to notorious crimes, without the benefit of a cost analysis of the impact of that new law on the court system or the prison population. Such quick response legislation is sometimes passed without an understanding of its effect upon other criminal laws or that criminal laws already exist which can adequately handle the problem. The result has been overlapping and conflicting criminal penalty provisions which create confusion at trials and impede the effective administration of justice. A Sentencing Commission can review proposed criminal legislation as to its impact on the court system, the probation and prison population, and cost to the state.

B. The Sentencing Commission's Functions, Role and Authority

The Sentencing Commission should monitor sentencing practices in this state. With this information, it can modify sentencing guidelines according to public safety needs and changes in sentencing practices, and compile data regarding anticipated resource needs.

The Sentencing Commission should report to the legislature in order to anticipate DOC budget needs, gain public support and public understanding of sentencing practices, and inform the governor, legislature, and other agencies of anticipated resource needs in corrections. The Sentencing Commission may use the computer model developed by this Committee to accomplish this.

The Sentencing Commission should work with the state legislature's budget office to project the fiscal impact of any proposed new criminal laws and changes such that the legislature make an informed decision on same. The Committee foresees this function as similar to that contained in a proposal recently considered by the Joint Finance Committee requiring fiscal estimates for legislative bills with penalty provisions, referred to as the "prison pay-as-you-go" plan.

At least on a limited basis, the Sentencing Commission should take the lead in teaching the sentencing guidelines. It should also aid in educating judges, prosecutors, public defenders and the private bar concerning sentencing guidance.

The Sentencing Commission should issue statistics, updated semi-annually, or even quarterly if possible, publishing what sentences offenders received, on which crimes, both statewide and by the following geographical areas: Milwaukee County, Dane-Rock Counties, the Fox Valley, Racine-Kenosha Counties, and the rest of the state. These reports should be distributed to all judges.

These reports should have a different substantive theme each year to prevent them from becoming a purely statistical compendium. The Sentencing Commission should issue a public annual report with any proposed sentencing guideline revisions.

C. Sentencing Commission Membership

The Committee decided that the new Sentencing Commission should have a make-up similar to the Criminal Penalties Study Committee. The Sentencing Commission should have 17 regular members:

The state attorney general or designee
The state public defender or designee
7 members appointed by the Governor, including 2 not in public employment
1 member from the political party other than the Governor's[301]
2 circuit judges appointed by the Supreme Court
1 member appointed from the state senate
1 member appointed from the state assembly
1 victim's advocate appointed by the attorney general
1 district attorney appointed by the attorney general
1 private defense attorney appointed by the criminal law section of the State Bar of Wisconsin

The Sentencing Commission also would have 3 ex officio, non-voting members:

The secretary of corrections or designee
The parole commissioner or designee
The state court administrator or designee

The Governor should appoint the chair of the Sentencing Commission.

A term of service on the Sentencing Commission should be for 3 years. The Committee recommends no term limits because of the specialized and detailed knowledge members will accrue over time regarding sentencing issues. The terms should be staggered so that members already on the Commission could educate new members.

[301] Appointed by the state senate majority leader or minority leader, whichever applicable.

D. Sentencing Commission Staff and Budget

This Committee researched other states' sentencing commissions, especially Virginia's. The Committee recommends that the Sentencing Commission have a staff of 6 persons. Although the Sentencing Commission itself should decide the functions of the various staff members, the Committee thought that a good breakdown of the 6 positions could be:

1 executive director
1 deputy director
1 data entry operator
2 research analysts
1 training coordinator

A cost estimate for the new sentencing commission is attached at Appendix C.

E. Duration of Sentencing Commission

The Committee debated whether the new Sentencing Commission should be temporary or permanent. The Committee recommends that after the Sentencing Commission's initial run of 5 years, the Sentencing Commission should sunset with a provision for legislative review to decide whether or not the Sentencing Commission should continue.

F. Character of Sentencing Commission

The Committee proposes that the new Sentencing Commission be attached to the Department of Administration for all administrative support services, as was the previous sentencing commission.

G. Scope of Sentencing Commission's Responsibility

Committee members agree that for the new Sentencing Commission to have the powerful policy role the Committee envisions, the selection of an executive director will be important.

H. Enactment and Modification of Guidelines

The Sentencing Commission should promulgate annually new sentencing guidelines or revisions to existing guidelines.

PART V

EXTENDED SUPERVISION AND ITS REVOCATION

Statutory charge: *"f. Changing the administrative rules of the Department of Corrections to ensure that a person who violates a condition of ES is returned to prison promptly and for an appropriate period of time."* [302]

A. Act 283's New Bifurcated Sentence Structure

Act 283 provides that if a court chooses to sentence a felony offender to a term of imprisonment in a state prison for a felony committed on or after December 31, 1999, the court must do so by providing a bifurcated sentence that includes (a) a term of confinement in prison, followed by (b) a term of extended supervision ("ES") in the community. The term of ES must equal at least 25% of the length of the term of confinement in prison. After the offender completes the prison component of the bifurcated sentence, the offender serves the term of ES subject to conditions set by both the court and DOC and under the supervision of DOC. If a person violates a condition of ES, supervision may be revoked and the person may be returned to prison for a period of time which may not exceed the amount of ES in the original sentence.[303]

B. Approach of the Extended Supervision Revocation Subcommittee

To address this particular statutory charge, the Committee constituted an Extended Supervision Revocation Subcommittee, which asked representatives from each of the entities involved in the present parole revocation process to participate, in a non-voting capacity, at its meetings. These participants included personnel from the DOC Division of Community Corrections and the DOC Office of Legal Counsel; the Department of Administration ("DOA") Division of Hearings and Appeals (including that division's administrator and at least one administrative law judge); the state Public Defender's office; and the state Attorney General's office. The Subcommittee relied on these representatives to educate its members on the revocation process, to give background information, and to answer members' questions. This arrangement allowed those who participate in the revocation process and who will be affected by the statutory and administrative law changes to help formulate the proposed recommendations.

The Subcommittee prepared recommendations and proposed changes to relevant parts of the Wisconsin Statutes and Administrative Code, which the Committee discussed, made minor revisions to, and ultimately adopted.

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[302] See 1997 Wis. Act 283 sec. 454(1)(e)6.

[303] Explanation of some of the details of ES and its revocation procedure in Act 283 may be found in Legislative Council Staff Information Memorandum 98-11 at pp. 9-13, and in Legislative Fiscal Bureau Informational Memorandum # 55 at pp. 4-7.

C. Extended Supervision Procedure

To determine whether, and if so how, any administrative law changes should be made concerning ES, the Committee had to understand what ES will look like in the "new world" of Truth-in-Sentencing on and after December 31, 1999. Accordingly, the Committee began its study by describing what it thought ES should look like, and then sought reactions from the DOC.

The Committee believes that ES should consist of differing levels of supervision based upon an offender's behavior. The Committee recommends that DOC start all offenders entering ES at a strict level of supervision, and that offenders may earn their way to lesser degrees of supervision as a result of good behavior. Considerations as to the appropriate level of supervision should include:

a. the length of that offender's ES term
b. the offender's dangerousness
c. any movement among levels of supervision by that offender
d. the offender's treatment needs
e. the existence/non-existence of a community environment/support network

The model the Committee used for strict supervision was described by the Intensive Sanctions Review Panel which issued its report in February 1998.[304] Its primary goal is to enhance public safety. In the Panel's strict supervision model, offenders may earn less restrictive levels of supervision only as a result of positive, measurable performance. It assumes a staff caseload of 20 offenders per agent. The purchase of service cost per offender would be expended upon halfway houses; confinement beds; alcohol, drug abuse, and sex offender programming; day reporting centers; employment programming; and psychological services.

The strict supervision model will allow for reduced caseloads in contrast to current parolee-to-agent ratios. This lower ratio will allow increased frequency of contact with offenders. Offenders will be required to participate in employment, education, treatment, and community services. Violations of supervision rules will meet with swift and sure consequences. The model employs streamlined due process procedures for confinement of offenders for violations of supervision. Agents in cooperation with the police actively search for, apprehend, and process absconders. Program operating hours are extended to 24 hours per day, 7 days per week. Increased use of computer technology for more efficient and effective supervision would be employed, and data collection would be implemented for ongoing evaluation of the program to measure improvements in community safety.

The DOC – Division of Community Corrections ("DCC") took these recommendations from the Committee and gave them detail. DCC also made a detailed

[304] See pp. 15-18 of that report.

cost breakdown of this strict supervision model. That estimate was an annual cost of $8,881 per offender, with a startup cost of $10,464 per offender.[305] This annual cost is less than one-half of the annual cost of a prison bed in Wisconsin, which is currently $19,330,[306] and slightly more than six times the annual cost of traditional probation and parole supervision in Wisconsin, which averages $1,400[307] annually for each offender supervised. The Committee believes that stricter and stronger supervision of offenders on ES will reduce the number of violators returned to prison.

The state Attorney General's office evaluated the strict supervision model and concluded that it meets basic due process requirements, as long as offenders being supervised on ES who enter strict supervision are not incarcerated. Supervision cannot be the same as confinement, as currently defined in the statutes.

The Committee recommends the strict supervision model as the initial stage of ES in order to increase the panoply of sanctions available to the DOC to match the spectrum of possible ES violations. As described below, the Committee emphasizes that its recommendation for strict supervision requires a sufficient number of local confinement beds to assure that offenders who violate ES will be held accountable swiftly. This will require that sufficient funding be allocated.

A graphic representation of the proposed ES (shaded area) compared to the current probation and parole (non-shaded area) follows:

[305] See Grosshans Jan. 20, 1999 memorandum to Judges Barland and Fiedler, attached as Appendix G.
[306] See Grosshans handout at July 9, 1999 CPSC meeting, a copy of which is in the Committee's files.
[307] See Grosshans handout at July 9, 1999 CPSC meeting, a copy of which is in the Committee's files.

	EXTENDED SUPERVISION
A. Primary Goal/ Population	Enhanced public safety by the strict supervision of all offenders returning to a community setting from prison.
B. Supervision Standard	Outcome-based Supervision Key components: • Movement to less restrictive supervision as a result of positive measurable changes • Minimum of twice weekly face-to-face contacts • Four additional collateral contacts per week • Mandatory employment, school and/or community service • Mandatory electronic monitoring
	Supervision Standards 1. High Risk • weekly face-to-face contacts • two home visits per month • electronic monitoring is at the agent's discretion (however, for certain sex-offenders, electronic monitoring is mandatory) 2. Maximum • face-to-face contact every 14 working days • monthly home visits • electronic monitoring is discretionary 3. Medium • monthly face-to-face contacts • home visits every other month 4. Minimum • face-to-face contacts every three months, monthly reports by mail on those months when not reporting in person • home visits at agent's discretion 5. Contract Supervision (for some administrative/minimum cases) • State has a contract to supervise certain minimum/administrative cases. These are phone-in contracts over a "900" telephone line. (These are usually "collection only" cases where an offender owes restitution/other court fiscal obligations. Offenders are stable in job, etc.) 6. Intensive Sanctions (ends as a sentencing option on December 31, 1999)Phase system (four phase, the first in a secure facility, the other three in the community) where an offender is required to have numerous face-to-face contacts each week at the agent's office, offender's residence, work of school; mandatory urinalysis; mandatory work/school/community service; electronic monitoring is mandatory in two of the three community phases. Inmates earn their movement to other phases based on their behavior and minimum time requirements in each phase.

C. Staff Caseload	Ratios (Agents: Offenders) 1:20
	Ratios (Agents: Offenders) Numerous ratios presently: • intensive sanctions 1:25 • enhanced supervision projects (Racine/Dane Counties) 1:17 • high risk (varies by region) 1:20 / 1:30 • traditional caseload average 1:72
D. Purchase of Services/Resources	$3,500 Per Offender • Housing (HWH, TLP) • Substance abuse programming • Sex offender programs • Employment Readiness/job skills training • Community service • Day report centers • Education
	1. $48.62 per offender/year for probation or parole supervision 2. Intensive sanctions funded at $2,190/offender
E. Hours of Work	Sevens days/week, 24 hour operation in select areas of the state
	1. Traditional supervision M-F, 7:45am-4:30pm 2. Intensive sanctions 7 days/week, 6:00am-10:00pm 3. Absconder Unit (Milwaukee) 7 days/week, 6:00am-10:00pm 4. Enhanced supervision (Racine/Dane) 7 days/week, hours vary 5. R.O.P.E. (Milwaukee)
F. Absconders	Caseloads of 1:20 would provide for active search for non-compliant offenders
	1. Created and funded in 1998 in Milwaukee. There are currently 20 absconder agents assigned to actively search for absconders 2. Enhanced supervision projects (Racine/Dane)
G. Transportation to the Community From Parole/MR	Mandatory DOC transport from prison to the community
	1. Mandatory DOC staff transport from prison to community for intensive sanctions and certain sex offenders 2. Offender is directed to report to the agent upon parole/MR
H. Institution Visits/Meetings	DCC staff required to meet with offender/ institution staff annually. In last year of institution of institution stay, DCC staff meet with offender/institution staff 6 months before extended supervision is to begin
	Not required – at agent's discretion
I. Urine Screening	Mandatory. • Baseline urine screens on all offenders at point of release • At least weekly urine screens
	1. Agent's discretion for traditional supervision model 2. Mandatory weekly for intensive sanctions 3. Federal requirement for truth-in- sentencing funds – 8% monthly of randomly selected parolees

J. Electronic Monitoring	Mandatory for all offenders upon return to the community
	1. Mandatory for intensive sanctions in two of the three phases 2. Mandatory for some sex offenders 3. Agent's discretion for traditional supervision
K. Neighborhood Supervision	Agents assigned/located in defined neighborhoods • Active supervision • Teams of staff and police • Work with neighborhood associations/others • The neighborhood is our "client"
	1. Developed in 1993, there is some form of neighborhood supervision in all regions of the state 2. Enhanced supervision projects (Dane/ Racine)-agents located in neighborhoods
L. Revocation/Return to Secure Confinement/Sanctions	1. Streamlined revocation process for program removal 2. Update re-incarceration forfeiture grid 3. Provide mechanism for return of offenders to secure confinement for up to 90 days (involuntary)
	1. Traditional supervision model – revocation process outlined in Administrative Code 331 2. Intensive sanctions – reduced due process provides for return to secure confinement 3. Sanctions – agent's discretion after consulting with supervisor
M. Technology	1. GIS – statewide 2. Electronic monitoring – discussed 3. Global positioning – if available/ reliable 4. Polygraph – expand statewide 5. Pagers/cell phones – provide to all agents 6. Juris monitoring – expand 7. Remote alcohol units – expand 8. Offender identification cards – create them/require offenders to carry them
	1. Geographical Information System (limited use) 2. Electronic monitoring 3. Global positioning/tracking (tested) 4. Polygraphs for sex offenders (limited use) 5. Pagers/cell phones 6. Juris monitoring (domestic violence) 7. Remote alcohol units 8. Offender identification cards (Racine)
N. Victims	Increase emphasis on rights of victims/ notification
	1. 10,000 victims registered in the Parole Eligibility Notification System (PENS) 2. Victim Advisory Committee
O. Community Advisory Boards	Required community advisory boards statewide
	Beginning to implement boards

P. Cost	$8,881 per year
	1. Probation and Parole - $1,400 per year 2. Intensive Sanctions - $7,400 per year
Q. Secure Beds	Will require secure beds
	1. Use of county jails/reimbursement for felony non-criminal violations 2. Milwaukee • 125 beds at county jail • 300 beds at House of Correction • 300 beds at Racine Correctional Institution • 1048 bed facility to open February, 2000 3. Biennial Budget • Secure P/P Hold Facilities

D. Sanctions for Violation of ES Condition(s)

After it hypothesized what ES will look like, the Committee addressed the possible sanctions for violation of an ES condition or conditions. The Committee envisioned three tiers of such sanctions:

1. Alternatives-to-revocation ("ATR")
2. Confinement Sanction
3. Revocation

The Committee's recommendations as to each of these tiers are explained below.

1. Alternatives-to-Revocation (ATRs)

The Committee concluded that current alternatives-to-revocation should remain unchanged, with one exception, explained immediately below.

Current ATRs include:

a. modify the rules of supervision (e.g. no contact provision)
b. increase the level of supervision
c. complete a program (e.g. anger management)
d. community service
e. halfway house placement
f. electronic monitoring
g. formal alternative to revocation in a state correctional facility (felons only)
h. curfews/home confinement
i. return the offender to court to modify the rules of supervision

The one current ATR the Committee thought should not be retained was detention for disciplinary purposes, which requires supervisory approval and cannot exceed 5

working days pursuant to Wisconsin Administrative Code DOC 328.22(c)(3). This ATR would be eliminated in favor of a confinement sanction, explained below.

When an administrative law judge ("ALJ") determines whether a violation of supervision has occurred, the ALJ must address the availability of reasonable alternatives-to-revocation pursuant to the ruling in Plotkin v. Department of Health & Social Serv., 63 Wis. 2d 535, 217 N.W. 2d 641 (1974). The committee heard from various individuals who worked with the revocation process that over the years the Plotkin criteria had been codified in Chapter Hearings and Appeals 2 of the Wisconsin Administrative Code.[308]

The Committee heard from many individuals unhappy with the current interpretation of the Plotkin criteria. It became clear that certain ALJ's, and others in the revocation process, were interpreting the criteria to mandate that a supervising agent attempt all possible alternatives to revocation before an offender being supervised could be revoked. Accordingly, the Committee has reviewed and revised applicable statutory and administrative law language to ensure that a supervisee may be revoked without the ALJ mandating that all possible alternatives-to-revocation be attempted.[309] The Committee recommends that these proposed revisions be adopted.

2. Confinement Sanction

No legal sanction currently exists between an alternative-to-revocation and full revocation. State agencies that assisted the Committee's work – including the state public defender's office, which now represents many probation and parole violators – desired a punishment mechanism short of full revocation, and less transparent than a disciplinary hold without an actual intent to revoke. Such a sanction will provide a solution to meet the problem of punishable but not revocable conduct. This sanction is less expensive than revocation and return of the offender to a $20,000 per year prison bed, which is in short supply.

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[308] In Plotkin, the Wisconsin Supreme Court adopted the American Bar Association standards relating to probation, which provide:

> Revocation followed by imprisonment should not be the disposition, however, unless the court finds on the basis of the original offense and the intervening conduct of the offender that:
> (i) confinement is necessary to protect the public from further criminal activity by the offender; or
> (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or
> (iii) it would unduly depreciate the seriousness of the violation if probation were not revoked.
>
> . . . In any event, the following intermediate steps should be considered in every case as possible alternatives to revocation:
> (i) a review of the conditions, followed by changes where necessary or desirable;
> (ii) a formal or informal conference with the probationer to re-emphasize the necessity of compliance with the conditions;
> (iii) a formal or informal warning that further violations could result in revocation.

Plotkin, 63 Wis. 2d at 544-45.

[309] See Appendix H.

After many discussions, the concept of the confinement sanction evolved. This sanction is short of full revocation for violation of an ES condition or conditions. The confinement sanction would involve confinement for an amount of time not to exceed 90 days in an ES regional detention facility, if available, or if not available, a county jail. If violations are alleged, and there is a signed admission of same,[310] then an ES agent can either: (a) invoke an ATR; or (b) impose up to a 90 day hold in confinement; or (c) begin the revocation process.

To successfully put the confinement sanction into practice, a number of requirements will have to be met. First, sufficient funds must be allocated for ES regional detention facilities to alleviate potential overcrowding at county jails. A good example is the probation and parole holding facility on which the DOC-DCC broke ground in Milwaukee in May 1999. Second, if the offender is placed in confinement in a county jail, sheriffs must (a) have the option to refuse the placement consistent with State v. Kleismet, 211 Wis. 2d 254, 564 N.W.2d 742 (1997), and (b) be fully reimbursed. Third, absent disciplinary circumstances, Huber privileges should be an option for ES supervisees in confinement. Fourth, confinement lasting 0-45 days must be approved by a DOC supervisor who has not been involved in that individual defendant's supervision; confinement lasting 46-90 days must be approved by a regional DOC chief.

The Attorney General's office offered has evaluated the confinement sanction and concluded that a 90-day hold will be legally acceptable provided that the offender admits the violation. This is true even though there is no formal due process other than supervisory approval.

3. Revocation and Return to Prison

In its examination of the current revocation process, the Committee heard from various entities involved in the process. Pursuant to its statutory charge, the Committee focused on streamlining and strengthening the process to provide better community protection from those who might violate this new form of community supervision.

First, the Committee concluded early on that administrative law judges, who currently conduct revocation hearings and make revocation decisions, should continue to do so. This was considered most efficient and effective as it speeds up the process and eases the workload of circuit court judges. In the "new world" of Truth-in-Sentencing, the ALJ will continue to conduct the revocation hearings, prepare a report containing specific findings of fact, and make the revocation decision. If the ALJ decides to revoke, the ALJ will also make a recommendation to the circuit judge as to the period of prison time the revoked offender should serve.

Wisconsin has spent many years and millions of dollars constructing the current ALJ system. The Committee finds this system to be working relatively well. In 1997,

[310] Study yielded that supervisees admit approximately 90% of violations of condition of parole and probation.

DOC submitted 1,495 requests for hearings in parole revocation cases to the DOA Division of Hearings and Appeals. In 561 of those cases, offenders waived their right to a hearing. In 324 of those cases, DOC withdrew its revocation request, and in the remaining 576, the DHA conducted a hearing and rendered a decision. Of those 576 cases, the DHA revoked the offender's parole in 546; in 30 parole was not revoked.

To shorten the revocation process too much could rob the system of its natural attrition. As demonstrated in the figures just cited, many revocation hearing requests are withdrawn or hearings are waived. This allows the system to function efficiently. Also, higher costs will result should the revocation process be shortened too much. It is DHA's experience that shorter time limits generate more case referrals. Thus, any reduction in the time limit would require a corresponding budget increase. The state public defender's ("SPD") office agreed with the DHA's reluctance to shorten the revocation process too much, as the SPD staff preferred as much time as possible to prepare for revocation hearings.

The appeal from the ALJ's revocation decision will continue to be to the DHA administrator. This allows for errors to be caught before circuit court review. But the administrative review of the ALJ's decision will be discretionary rather than mandatory. Administrative review is not automatic in every case and will occur only when timely requested by an offender whose ES supervision has been revoked.

The ALJ's report (and the administrator's written decision, if appealed) will be forwarded to the circuit court that originally sentenced the offender. The Committee recommends that the same circuit judge who originally sentenced the offender, or that judge's successor, handle the disposition hearing, but recognizes that circuit courts may elect to adopt other assignment procedures for these disposition hearings.

The Committee recognizes that pursuant to Drow v. Schwartz, 225 Wis. 2d 362, ___ N.W.2d ___ (1999), review of probation/parole revocations may be had by writ of certiorari in the circuit court of the county of conviction, but that did not necessarily mean the same branch of the circuit court. If that is not possible, the return is to the circuit court of the county of conviction consistent with Drow. Circuit courts may adopt local rules specifying assignment of these matters for imposition of the new bifurcated penalty.

The circuit judge will conduct the disposition hearing and determine an appropriate time period for the revoked offender to be returned to prison. The disposition hearing is not a "resentencing." Rather, the judge will decide the new bifurcated penalty (prison + extended supervision) that the supervisee will serve as punishment in this revocation. The judge will be limited to the total amount of ES time to which the offender was originally sentenced from which to calculate this new bifurcated penalty. This will involve the circuit judge in the decisionmaking process consistent with the accountability philosophy underlying Truth-in-Sentencing, but with minimal impact on the judge's time, and take advantage of the ALJs experience in this area. (Currently, the ALJ alone makes this decision, with power to reverse lodged with the administrator.)

The Committee concluded that the disposition hearing should be conducted before a circuit judge because, in certain cases, the offender could be returned to prison for a substantial length of time. It is best that such a decision, which would involve a tremendous impact on the offender and consume significant corrections resources, be made by a judge who is accountable to the electorate.

The Committee does not recommend altering the current writ of certiorari path for circuit court review of the revocation decision. The offender will retain the writ of certiorari remedy. Also, the Committee agrees that the DOC should be allowed to seek certiorari review of an ALJ's decision not to revoke. Although the Attorney General's office believes that DOC currently has the authority to seek a writ of certiorari for review of an ALJ's decision not to revoke a parolee, the proposed statutory language will clarify that authority. The internal DOC process, by which an agent initiates an ATR or the revocation procedure, will not change.

The Committee recommends that 1997 Wis. Act 283 be revised such that the judge have the authority to modify the conditions of ES. At the time of sentencing, the judge may not be aware of all possible supervision options available at the end of a long period of confinement. The Committee believes that a supervisee should be able to petition for modification of ES conditions, but not before 1 year before the offender's confinement portion of his sentence is to end, and not more than once annually after the period of ES begins.

Pursuant to its statutory charge, the Committee studied the time period for revocation decision to try to ensure it is as short as advisable. Currently, it takes 84 days from alleged revocable conduct to decision on administrative appeal. The Committee saw the need to reduce this time period, because only if offenders understand that punishment for revocable conduct will follow quickly will such conduct decrease. The Committee proposes modifications to expedite the revocation decision and decrease the timeline to 71 days. According to the Attorney General's office, as long as the new administrative rules to be promulgated are directory and not mandatory, and deadlines remain in the DOC or the DHA's discretion, no due process problems exist with this new shortened timeline. The Committee believes that because the limits are directory only, a violation of the time limits is not intended to invalidate or vacate a revocation or subsequent period of reincarceration.

The Committee envisions the following timeline for the revocation decision:

***DAY** (actual, not work)*	
0	**Hold for alleged ES violation and SPD notified**
10	**Notice of violation and violation report completed and DOC reaches decision on revocation – copies given to offender and SPD**

13	**Hearing request and violation report forwarded to ALJ and copied to SPD**
13-15	**Preliminary hearing, per current practice, held before P&P supervisor not in chain of command for that ES supervisee**
16	**Notice of full hearing**
20	**Revocation packet to be prepared**
40	**Full hearing**
47	**ALJ written decision**
57	**Appeal due – if no appeal, trial court notified**
64	**If appeal, response due**
71	**Administrator's decision – trial court notified**

E. Hearing Location – Regional ES Detention Facilities

The DHA currently holds probation and parole revocation hearings in county jails. Although the DHA frequently chooses to use the jail in the county where the offender was last being supervised, it also often substitutes the jail where the offender is actually confined for a new crime or sentence. But jails often move offenders to other "contract" locations due to overcrowding. As a result, hearings are often held at a site other than where the offender is actually confined. This can cause problems for the parole agent as well as for any assigned attorney if they are unable to obtain ready access to the offender prior to the hearing. It also requires that the offender be transported from one location to another for the hearing. Holding the hearing at the site of the offender's location may also require that witnesses travel a great distance to the hearing or that the jails make available video and teleconferencing equipment.

The Committee's recommended solution to these problems is the creation of regional detention facilities for probation and extended supervision detentions. (Such a facility is now being constructed in Milwaukee.) These facilities would add stability to the hearing process, minimize the impact of the process on county facilities, and would allow suitable hearing space, which could includes new technologies for video and teleconferencing. These facilities would also give the DHA a resource to use in treatment situations and would provide a location for confinement sanction placements. Finally, these facilities would provide some advantage to DHA by allowing it to schedule "clusters" of revocation hearings rather than being required to travel to isolated locations for just one hearing.

In many instances, the local county jails will remain the most viable site for revocation hearings. In other situations, the state may want to "lease" regional detention facilities from interested counties, or part of an existing corrections facility may be able to be converted into a regional detention facility. The final configuration of such facilities should, however, take into account the need to keep the offender and the hearing reasonably close to the site of the violations.

F. Will Changing the Revocation Criteria Apply Only to New Law Offenders, or Also Apply to Old Law Offenders?

The Attorney General's office has advised the Committee that applying the new revocation procedures to old law parolees as well as ES supervisees under Truth-in-Sentencing would not violate the principle of ex post facto. These procedures include the modified interpretation of the Plotkin criteria and the shortened revocation time line. (The Committee does not intend for the new confinement sanction procedures to apply to old law parolees.)

The Committee recommends that the new revocation procedures relating to a modified interpretation of the Plotkin criteria apply to both new law supervisees as well as old law parolees. The Committee recommends that the new revocation procedures relating to the shortened revocation time line apply only to new law supervisees. The Committee consulted with various state agencies, including the DOA-Division of Hearings and Appeals, the State Public Defender, and the DOC, and each agency stated that they could not apply the shortened revocation time line to old law parolees properly given present resource limitations.

G. Geriatric Clause

The Committee considered the situation of elderly, unhealthy prisoners and their increasing medical costs for the corrections budget. In its study of how Virginia implemented Truth-in-Sentencing, the Committee noted with approval that state's statute which allows certain elderly, non-risky prisoners to petition for early release from prison, although the individual remains on community supervision.

Accordingly, the Committee recommends the adoption of a procedure by which certain older prisoners who have been given a bifurcated sentence may petition the sentencing court for a modification of the terms of their sentences. The procedure is available to prisoners who are 65 years of age or older who have served at least 5 years in confinement on their bifurcated sentences, as well as to prisoners 60 years of age or older who have served at least 10 years in confinement on their bifurcated sentence. Under the procedure, the prisoner may file a petition with the Department of Corrections Program Review Committee, which, if it finds that the public interest would be served by a modification of the prisoner's bifurcated sentence, may then refer the petition to the sentencing court. If a petition is referred to a sentencing court, the court must determine whether public interest would be served by a modification of the prisoner's bifurcated sentence. The victim of the prisoner's crime has a right to provide a statement

concerning the modification of the sentence. This procedure is not available for offenders sentenced for Class A or Class B felonies.

If the sentencing court decides that the public interest would be served by such a modification, the court must modify the sentence by: (1) reducing the term of confinement in prison portion of the sentence by a certain period of time and releasing the prisoner to extended supervision, and (2) increasing the term of extended supervision of the prisoner by the same period so that the total length of the original bifurcated sentence does not change.

H. Recommended Statutory and Administrative Law Changes

The Committee's recommended statutory and administrative law changes are contained in Appendix H.

PART VI

COMPUTER MODELING

A. The Challenge

Each of the representatives of other Truth-in-Sentencing states from which the Committee heard – North Carolina, Virginia, Delaware, and Ohio – remarked how important a corrections population projection mechanism had been in their consideration of different policies. Individual Committee members also noted that the Committee's recommendations could have a large impact on increasing corrections population and the state's corrections budget.

Technical specialists were polled at each of the states from which the Committee had heard to determine how each state developed an accurate forecast of prison population and cost. Each state's technical expert stressed that for the Committee's work to have credibility, it must accurately forecast prison population and cost.[311] Also, a survey was done of the type of data Wisconsin has within its DOC and CCAP ("Circuit Court Automation Project") data systems to determine whether, and if so, how, such data could be used to meet the needs of committee members.

Given other states' experiences, and the desires of Committee members, it was concluded that, although not one of the Committee's express statutory charges, the Committee should attempt to develop a computer model to: (1) evaluate corrections data by crime, sentence length, time actually served, and consumption of prison beds and resources; and (2) project the impact of criminal justice policy changes. Not to do so would have been irresponsible.

B. A Major Problem

A common refrain heard at this Committee's meetings was that Wisconsin's corrections data cannot be accessed in a useful way. The Committee had serious difficulties getting basic statistical questions answered, not out of lack of effort by DOC – Bureau of Technology Management ("DOC—BTM"), or any other state entity, but because Wisconsin retains its corrections data in an antiquated manner. Further, the state has not done a good job of linking corrections and other criminal justice data systems. The installation of OPUS, ("Offender Population Unified System"), DOC's new prison population tracking system, and the increasing coverage of CCAP, could address some of these problems. But this is an area that requires much improvement. The new Sentencing Commission will require this data for its deliberations and recommendations.

[311] The North Carolina Sentencing and Policy Advisory Commission graciously gave the committee free of charge a copy of its prison population projection software, which is now in the public domain. Unfortunately, it could not be adopted for use in Wisconsin because it uses a structured grid format which the Committee did not choose to adopt.

Currently, that data is not accessible. It was necessary for the Committee to in effect "go around" Wisconsin's data to build the computer model.

C. Wisconsin's Current Ability to Forecast Corrections Population

First the Committee turned to the DOC to determine whether or not it currently used such a statistical projection mechanism. It did not. Currently, the DOC uses a software package named "Forecast Pro." That software looks at data points over time to discern trends – e.g., corrections population at certain dates. Then it projects a trend into the future based upon a single variable – those past data points. Because it examines only a single variable, Forecast Pro did not allow for the policy analysis the Committee required. Forecast Pro has no explanatory power, as all it can do is forecast the next point in a series based upon past points. It would not allow the Committee to determine the causes behind the projections – e.g., whether the corrections population for a certain crime was increasing, and how a reclassification of that crime, or a different guideline for that crime, might affect both that crime and the overall corrections population, and thus the resources implicated.

OPUS may contain a corrections population projection component, but it is not expected to be installed completely until 2003. CCAP is on-line in 66 of Wisconsin's 72 counties and given full funding and use by all state circuit courts in the future may fulfill this population projection function. But it will not be able to do so for at least the next few years.

D. Subcommittee and Working Group Formed

The Committee formed a Computer Modeling Subcommittee to address this challenge. Because of the technical complexity of this challenge, the Committee relied heavily on technical assistance from various individuals already employed by state government. These individuals formed themselves into a working group which met every few weeks to address the continuing issues of data collection, data structuring, and monitoring technical consultants hired to build the model. The working group included representatives of DOC—BTM, CCAP, the DOA – Bureau of Justice Information Services ("BJIS"), as well as professor Michael Smith of the University of Wisconsin Law School, who had previously developed a computer model used by the Governor's 1996 Task Force on Sentencing and Corrections.

The Computer Modeling Subcommittee had to secure data to answer two critical sets of questions:

> (A) Who is in prison now, on what crimes, on what length of sentence, and how much prison time would they actually serve? This current population will drive future numbers, and to an extent policy recommendations, for some years. An accurate picture is needed of what is happening in and to the current DOC population.

(B) What are past and current sentencing practices, and how do they relate to the criminal histories of the offenders in the DOC database? What are the trends in sentences per crime, and by type of offender?

Once this information was secured, the subcommittee thought that computer modeling software could be borrowed, modified, or built to project prison population and assess the impact of Truth-in-Sentencing code reclassification and new sentencing guidelines.

E. Federal Technical Assistance

Dr. Ron Anderson of the University of Minnesota met with the working group on February 4 & 5, 1999 to render technical assistance on this project.[312] Dr. Anderson developed the first computer model for structured sentencing simulation, variations of which are used in several states, including Minnesota and North Carolina.

The working group met with Dr. Anderson over two days. The first day was spent discussing the minimum data requirements for the forecasting tasks of the Committee. In discussing those data requirements, the first and consistently most difficult hurdle the committee faced was with how the State of Wisconsin maintains its corrections data. The working group included individuals from DOC and CCAP expert in their respective databases. These individuals were questioned at length as to how the Committee might secure the two types of data referenced above. No number identifies a single offender in each of the DOC and CCAP systems, so access was severely limited. This was especially troubling for our task, as the modeling effort needed sentencing and criminal history information from CCAP, as well as information from DOC as to how many offenders are actually serving how much time on which crimes. Because DOC has very limited criminal history information, and CCAP does not have time-served information, the data could not tell us which criminals will be serving what sentence lengths on which crimes.

The numerous state employees aiding this effort attempted to unravel the differences between the CCAP and DOC data and to map out a "data cleansing" and subsequent "data linkage" task list. The huge magnitude of this task became clear when the group attempted to assign ownership to and time frames on the various tasks necessary just to posture the data in a format accessible for the type of model the Committee would find useful, much less to start the actual modeling. Finally, it was concluded on the second day that the Committee's short deadline dictated that it would not be possible to merge the court and corrections data in a timely manner.

Dr. Anderson issued a pessimistic report given the Committee's data requirements and constraints, and the Committee's timeline and requests:

> The work involved in obtaining adequate information from corrections databases, to say nothing of the construction of criminal justice models and hypothetical simulations would be challenging even to a large

[312] A federal technical grant paid for Dr. Anderson's expenses.

> research staff with a year of time to do it. Given that the Committee has neither such a staff, nor more than a few months of time, they will need considerable additional technical expertise to accomplish their tasks. We made major conceptual progress in the two days of discussion, but I advised them that, on the basis of my experience with other states, they were being much too optimistic in their expectations for doing this work with their existing constraints in terms of both resources and time.

Dr. Anderson told the working group that it would take a number of years, perhaps as many as four or five, to develop the type of computer model the Committee was seeking.

F. Solution

With the help of Professor Smith, the working group altered its approach from asking a model to "microsimulate" -- replicate an offender's movement throughout the corrections system, and then aggregate that data -- to a “consumption” approach -- modeling and mining existing data in terms of its consumption of resources, which could provide estimates of corrections numbers and dollars, both principal concerns of the committee. This "consumption" approach attempted to answer 3 questions:

> (A) What resources does Wisconsin need to service its existing corrections population over the next 10 years? ("old world")?
>
> (B) What resources does Wisconsin need to service those individuals convicted after 12/31/99 over the next 10 years, absent any guidance from this Committee ("new world without guidance")? and
>
> (C) What resources does Wisconsin need to service those individuals convicted after 12/31/99 over the next 10 years, modeling this Committee's recommendations ("new world with guidance")?

This consumption model would be less data intensive. DOC data could be relied upon heavily, and it was not necessary to link DOC and CCAP data, although CCAP sentencing data would be used in the model’s calculations. This type of model could be constructed more quickly, and would more readily fit the Committee's needs to debate differing recommendations for crime classifications and sentencing guidelines.

G. Hiring of Technical Consultants to Construct Computer Model

The Computer Modeling Subcommittee interviewed applicants to serve as outside technical consultants. The consultants would work with the working group to build a “consumption approach” computer model. The consultants needed expertise in statistics and computer applications. They had to be able to manage and manipulate complex datasets. They also had to be able to advise on and implement various statistical tests and forecasting techniques. The consultants had to be able to massage and mine the data for the information the Committee needed, be able to work with DOC and CCAP people to

ensure the proper data is in the system, and be able to run "what-if?" queries on the model as the committee debated differing policies.

At the suggestion of the DOC-BTM, the subcommittee interviewed representatives of IBM, as that company had been retained to install OPUS at DOC. IBM did a preliminary analysis of the Committee's computer modeling needs, and offered an approximate bid of $175,000. The subcommittee found this price tag too expensive. The subcommittee also interviewed Systems Seminar Consultants ("SSC") of Madison, Wisconsin, and concluded that SSC best fit this job description.

H. Computer Model Constructed

The intended use of the computer model is to study the effects of different scenarios. The model gives the user the flexibility to change input parameters, allowing different policies to be forecasted.

The DOC—BTM supplied SSC with over 8 years of historical corrections data, which included prison, probation, and parole information. That information described when each inmate made a transition among various statuses at DOC: e.g., from prison to parole, from probation to prison, or from parole to prison, etc.

The DOC data tracked offenders by what is termed a "governing statute." This means that if an offender is convicted of more than one crime, he might be tracked under a particular burglary statute, and not the criminal trespass statute on which he was also convicted. This problem, plus the vast number of statutes and their individual subsections, and changes in the statutory numbering of drug penalties hindered grouping the data into a manageable number of crime categories. Committee staff and SSC worked together to classify similar statutes into distinct felony groupings. The result was 47 felony categories that covered more than 500 individual statute classifications. Those groupings are:

1. **1st Degree Intentional Homicide**
2. **1st Degree Reckless Homicide**
3. **Other Homicide (e.g.: 2nd Degree Intentional Homicide; Felony Murder)**
4. **Substantial/Aggravated Battery**
5. **Battery**
6. **Other Bodily Security (e.g.: Mayhem, 1st and 2nd Degree Reckless Injury)**
7. **1st Degree Sexual Assault**
8. **1st Degree Sexual Assault of a Child**
9. **2nd Degree Sexual Assault**
10. **2nd Degree Sexual Assault of a Child**
11. **3rd Degree Sexual Assault**
12. **Kidnapping/Hostage Taking/False Imprisonment**
13. **Stalking**
14. **Intimidate Witness/Victim**
15. **Child Abuse**
16. **Other Crimes Against Children (e.g.: Incest, Child Enticement)**
17. **Armed Robbery**
18. **Unarmed Robbery**

19. **Burglary**
20. **Tresspass**
21. **Theft (including felony Retail Theft)**
22. **Receiving Stolen Property**
23. **Operating Vehicle Without Owners Consent**
24. **Criminal Damage to Property (including graffiti offenses)**
25. **Arson**
26. **Weapons/Explosives (e.g.: Felon in Possession of Firearm)**
27. **Other Public Safety Crimes (e.g.: 1st and 2nd Degrees of Recklessly Endangering Safety)**
28. **Gambling**
29. **Drug Manufacture/Delivery (but not Cocaine or Marijuana)**
30. **Drug Possession With Intent to Deliver – Marijuana**
31. **Drug Possession With Intent to Deliver – Cocaine**
32. **Drug Possession (but not Cocaine or Marijuana)**
33. **Drug Possession – Cocaine**
34. **Drug Possession – Marijuana**
35. **Other Drug Offenses (e.g. Maintaining Drug Trafficking Place)**
36. **Traffic-related Felonies**
37. **Forgery**
38. **Issuance of Worthless Checks**
39. **Public Assistance Fraud**
40. **Other Fraud (e.g.: Food Stamps, W2)**
41. **Perjury**
42. **Escape**
43. **Bail Jumping**
44. **Extradition**
45. **Interference with Law Enforcement**
46. **Other Felonies (e.g.: election law violations, securities law violations)**
47. **Unidentified Felonies**

The modelers received data from the Circuit Court Automation Project ("CCAP") concerning imposed sentence lengths for each of these categories. This data was from 1996-1998. Median time served for incarcerations, median parole time, and median probation time were calculated from the master data set supplied by the DOC. The computer modeling working group performed a series of validation exercises to ensure these figures were correct.

With help from individuals knowledgeable about the current indeterminate and future determinate sentencing systems, SSC developed a transitional matrix. Transitions among different corrections states (i.e. incarceration, parole/extended supervision, or probation) were aggregated and summarized to yield statistics for the matrix. This matrix included revocation rates, parole rates, discharge rates, and continuation rates (chance of continuing in same state) across each of the 47 categories.

Average new additions for incarceration and probation for each category were also calculated. These were the average new additions to the corrections population for incarcerations and probation across 1990-1998.

SSC made extensive efforts to validate the accuracy of the DOC data. During this process, it noted overlapping episodes: e.g., a single offender was listed in incarceration and parole status at the same time. The computer model working group worked hard to

unravel these problems, and ultimately relied on adult institution incarceration data to take precedence over conflicts in the parole and probation data.

After the data had been validated, the transitional matrix was applied to the projected prison population on 12/31/99. New additions were not added. This gave an estimate of the "old world" (pre-Truth-in-Sentencing) population decline across the next 9 years.

SSC then calculated "new world" population growth with new Truth-In-Sentencing additions from 1/1/2000 forward for the next 9 years. SSC ran initial projections across many scenarios with different parameters. SSC also used revocation rates from the "old world" transitional matrix across all felony categories.

After the initial presentation of the computer model to the full Committee, a few members questioned the integrity of portions of the data. There was much discussion about the validity of the "old world" scenario. The consensus was that the "old world" prison population was declining too rapidly in the model. So SSC used maximums, rather than averages, for each of the transitional probabilities. This adjustment slowed "old world" decay significantly. This adjustment also addressed a concern over probation revocation rates being too low. To keep adjustments consistent, "new world" parameters were also revised.

SSC created a front-end template for the Committee and subsequent Sentencing Commission to use for flexible input of "new world" computer model parameters. The model's user can change the following parameters: (1) new addition counts; (2) revocation rates; (3) sentence lengths; (4) extended supervision (ES) parameters, including length; (5) ratio of incarceration to probation. These parameters can be changed for the whole scenario, or per crime category.

The model produces an overall summary as well as individual summaries at the category level. The output consists of three components: (1) "new world;" (2) "old world" decay; and (3) "new world" and "old world" decay combined.

I. Use of Computer Model and the Model's Results

The computer model was used in different ways. It was used to assess code reclassification decisions to ensure that when a crime was placed in a new class (Class A through Class I), the new maximum period of time in prison for that class "fit" with the majority of the time periods offenders were serving for that crime. If offenders currently serve much more time than the new maximum, the crime was classified with too short of a maximum. If offenders currently serve much less time than the new maximum, the crime was classified with too long of a maximum.

Charts of several high-volume crime categories (felony battery; burglary; operating vehicle without owner's consent; possession of controlled substance – cocaine) were reviewed to assess what percentage of imposed and time-served sentences fall under

the Committee's proposed classifications for those crimes. The results were encouraging. The proposed crime classifications (H, F, H, and G, respectively) captured high percentages of the time-served sentences for each of these crimes (79%, 82%, 78%, 92%, respectively). The Committee's choice of felony classes for these crimes was thus judged to be correct.

The model was also used to forecast corrections population and corrections costs. Immediately following this section may be found population and cost estimates for five different scenarios.[313] These scenarios make a number of assumptions:

Scenario 1: **JUDGES DO NOT CHANGE SENTENCES**
Judges sentence offenders to same prison terms in the old world and the new world.
ES in the new world = parole in the old world.

Scenario 2: **JUDGES ADJUST SENTENCES DOWN TO TIME-SERVED**
In the new world, judges adjust sentences down to time-served periods for the same crimes in the old world.
ES =25% of prison time served.

Scenario 3: **VIOLENT CRIMES=CURRENT SENTENCES; NON-VIOLENT CRIMES = TIME SERVED SENTENCES**
For violent crime categories (including drugs), judges sentence offenders to same prison terms in the old world and the new world, and ES in the new world = parole in the old world.
For nonviolent crime categories in the new world, judges adjust sentences down to time-served periods for the same crimes in the old world and ES = 25% of prison time served.
Violent crime categories (including drugs) = 1-12; 15-18; 29-35 (from the crime categories listed above.)
Nonviolent crime categories = 13-14; 19-28; 36-47 (same)

Scenario 4: **TOP 12 CATEGORIES = CURRENT SENTENCES**
For the 12 crime categories which produce the most new additions to the prison population, judges sentence the same in the old world and the new world, and ES in the new world = parole in the old world.
For the remaining crime categories, in the new world judges adjust sentences down to time-served and ES = 25% of prison time served.
12 categories are: (1) Drug possession
(2) Drug manufacture/deliver

[313] Cost estimates used the following figures: $19,330 per prisoner per year; $1,400 per parolee per year; and $3,103 per ES supervisee per year. (This last figure assumes $8,881 per supervisee per year for the 4.5% of that population on strict supervision; $3,500 per supervisee per year for the 43.1% of that population on "maximum" supervision; $2,450 per supervisee per year for the 43.9% of that population on "medium" supervision; and $1,400 per supervisee per year for the 8.5% of that population on minimum or administrative supervision.) All figures were arrived at from DOC materials.

(3) Burglary
(4) Unarmed robbery
(5) 1st deg. SA-child
(6) Theft
(7) 2nd deg. SA-child
(8) Other public safety crimes
(9) Possession with intent to deliver-cocaine
(10) Operating vehicle without owners consent
(11) Forgery
(12) Other homicide

Scenario 5: **MOST LIKELY SCENARIO?**

For violent crime categories in the new world, judges sentence offenders to 85% of old world imposed sentences, and ES in the new world = parole in the old world.

For non-violent crime categories in the new world, judges adjust sentences down to time-served and ES = 150% of prison time served.

A brief synopsis of these results are as follows:

Scenario 1	**2001**	**2005**	**2010**
Average Daily Prison Population	21,000	28,000	30,000
Cost Per Year	$400 million	$530 million	$580 million
ES/Parole Population	14,500	13,500	12,500
Cost Per Year	$20 million	$21 million	$22.5 million

Scenario 2	**2001**	**2005**	**2010**
Average Daily Prison Population	21,000	24,000	28,500
Cost Per Year	$405 million	$465 million	$450 million
ES/Parole Population	14,500	13,000	11,000
Cost Per Year	$20 million	$20 million	$18 million

Scenario 3	2001	2005	2010
Average Daily Prison Population	21,000	26,500	28,000
Cost Per Year	$405 million	$505 million	$550 million
ES/Parole Population	14,500	13,500	12,500
Cost Per Year	$ 21 million	$ 21 million	$ 21 million

Scenario 4	2001	2005	2010
Average Daily Prison Population	21,000	27,000	28,500
Cost Per Year	$400 million	$520 million	$550 million
ES/Parole Population	14,500	13,000	12,000
Cost Per Year	$20 million	$21 million	$22 million

Scenario 5	2001	2005	2010
Average Daily Prison Population	21,500	26,000	27,500
Cost Per Year	$405 million	$500 million	$525 million
ES/Parole Population	14,500	14,500	13,500
Cost Per Year	$20 million	$25 million	$27.5 million

For purposes of comparison, the DOC's budget for the fiscal year ending June 30, 1999 allocated approximately $360 million of GPR funds for adult institutions, housing an average daily population of 17,930 offenders. The Legislative Fiscal Bureau, in Paper #330, estimates an average daily population of 23,937 offenders for the Fiscal Year 2000-2001. The figures shown in the charts above estimate average daily prison population from January 1st through December 31st. The Department of Corrections and Legislative Fiscal Bureau figures estimate average daily population from July 1st through June 30th.

Graphs of these 5 scenarios can be found at Appendix I.

J. Future Issues

The Committee has identified a number of topics for future consideration in this area:

First, the CCAP system which courts use to gather sentencing information should be altered to accommodate the new Truth-in-Sentencing sentences which will be given after January 1, 2000. In the future, the Sentencing Commission and other state law enforcement entities will increasingly look to CCAP for data, since that system collects sentencing information statewide. It is important that CCAP remain fully funded, as for many years it will remain the primary source of sentencing information for the courts and litigants.

Second, sentencing guideline information must be collected in a streamlined manner for the new sentencing commission. This will require "computer-friendly" forms and a central data collection program. Information from the new guidelines forms will be instrumental in the new sentencing commission's work.

Third, the various law enforcement computer systems in use in Wisconsin should be linked to maximize utility and efficiency. Now, a single defendant will change identification numbers as he moves from arrest, through the court system, and into the corrections system. The technology exists to solve this problem. A common computer system, or at least a network linking existing systems, should be developed with a common defendant identification number.[314]

Finally, this computer model which the Committee has developed can be used by the Sentencing Commission to accomplish some of its data and policy analysis needs. The computer model was constructed such that it can be added on to and improved. The impact of Truth-in-Sentencing on Wisconsin's corrections population and resources probably will not be felt for a number of years. It is hoped that the Commission can use the computer model to spot danger points, and make guideline changes, with plenty of time to prepare and recommend changes to the governor and the legislature.

[314] On this topic, see Interagency Justice Information System Report, published September 1998 by the Department of Administration, Bureau of Justice Information Services; see also Legislative Fiscal Bureau Issue Paper # 190.

PART VII

EDUCATION OF THE JUDICIARY, THE BAR, AND THE PUBLIC

As the Committee's work progressed, members realized that educating the bench, the bar, and the public about this new law will be an important part of making Truth-in-Sentencing work. A complex, indeterminate sentencing system with parole, varying release times for offenders, and decisionmaking authority dissipated among prosecutors, judges, and the parole board will be replaced by a simpler, more straightforward system which employs some new principles and terminology.

This educational challenge is exacerbated by the short time period between the date of this report and the effective date of Truth-in-Sentencing, December 31, 1999. So another subcommittee was formed to formulate a strategy to educate the judiciary, the bar and the public about the new law, and to act as liaisons between the Committee and the media, members of the justice system and the public.

The education effort is important for another reason. In the "new world" of Truth-in-Sentencing, once a judge pronounces sentence, it is largely irrevocable. There is no parole, and sentence modifications will continue to be governed by the existing "new factor" test, which is rarely satisfied. The sentencing guidelines are expressly advisory. Accordingly, educating prosecutors and defense lawyers, who will be making sentence recommendations, as well as judges, who will be meting out these sentences, is extremely important. Also, educating the media and community groups will increase public understanding of the new law.

A. Education Plan

The Committee has decided to target education efforts at three core audiences: the bench, the bar, and the public through the media. It is critical that Wisconsin state circuit judges understand the new law and how it can be applied as they make the serious decisions about whether an offender should be sentenced to prison and for how long. Advocates in the new system must understand how it works as they negotiate, plead, and try cases in the new world of Truth-in-Sentencing, and as they argue on behalf of their clients at sentencing hearings. Members of the general public, the beneficiaries of Truth-in-Sentencing, can look forward to an easier understanding of the criminal justice system, but also must be taught the new system through the media. The new system will often mean shorter sentences in the number of years pronounced at sentencing, but may result in equal or greater time actually served in prison.

Various vehicles were considered and then chosen to accomplish this education effort. The Wisconsin Supreme Court's public information office has helped in a number of ways. For example, that office helped by drafting a prototype media plan.[315]

B. Education Efforts Thus Far

The education subcommittee already has accomplished two major education efforts, one for judges and one for prosecutors.

On May 20, 1999, committee members and staff made a presentation at the 1999 Criminal Law & Sentencing Institute in Eau Claire, Wisconsin. Approximately 105 judges attended. Committee staff counsel made a presentation on the new law, and Committee members formulated and administered a survey of how judges sentencing practices might change from the current law to the new Truth-in-Sentencing law. The survey contained exercises for burglary, armed robbery, sexual assault and drug cases, and utilized mitigated, intermediate, and aggravated fact scenarios, which the judges considered using low-, medium-, and high- risk offender profiles. An analysis of the survey responses was done. In general, judges sentencing offenders under the new Truth-in-Sentencing law lowered the prison component of the new bifurcated sentences to take into account the determinative nature of these new truthful sentences. This was true of their sentences for the burglary, armed robbery and drug dealing scenarios, but not for sexual assault. Overall sentence lengths increased, as judges gave lengthy post-prison extended supervision periods for some scenarios; thus, the overall period of state involvement with an offender increased in the Truth-in-Sentencing sentences.[316]

Committee members also participated in a discussion with the judges attending the seminar about the various aspects of Truth-in-Sentencing. The judges made some interesting comments. When filling out the survey, about one-half of the judges went through the mental exercise of translating indeterminate to determinate sentences. When doing so, the judges rarely used time to first release (25%) of the indeterminate sentence in this calculation. Rather, they used their own estimate as to how long an offender at the specified level of risk committing an offense of the stated severity would serve. Approximately one-third of the judges present, mostly from Milwaukee, did not have confidence in probation. Many judges said that they would continue to give out one- and two-year sentences, even though this might mean the offender will serve between two and four times as much real-time on such sentences.

On June 16, 1999, Committee members and staff made a presentation at the 1999 State Prosecutors Education and Training Conference in Egg Harbor, Wisconsin. Approximately 240 prosecutors attended. Again, Committee staff counsel spoke about the new law, and Committee members participated in a discussion among the prosecutors about the various aspects of Truth-in-Sentencing. Committee members also administered a shorter version of the same survey of sentencing practices under the new law given to the judges at Eau Claire.

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[315] A copy of this plan is attached as Appendix L.

[316] A copy of this spreadsheet analysis is attached at Appendix J.

That survey contained exercises for burglary, armed robbery, and sexual assault cases, and used mitigated and aggravated fact scenarios, which the prosecutors considered using low- and high- risk offender profiles. An analysis of the prosecutors sentence recommendations was done. In general, prosecutors proposed bifurcated sentences for offenders under the new Truth-in-Sentencing law with lower prison components. Overall sentence lengths increased slightly, so again the overall period of state involvement with an offender increased slightly.[317]

Committee members met with City of Milwaukee Mayor John Norquist on February 15, 1999, and with Milwaukee County Executive Thomas Ament on March 11, 1999, to give them an overview of Act 283 and the Committee's work, hear their thoughts on Truth-in-Sentencing, and to begin a dialogue between their offices and the Committee. Also, on June 17, 1999 staff counsel made a 2 hour presentation to the state's chief judges, deputy chief judges, and court administrators on Act 283 and the Committee's work.

C. Future Education Efforts

For a variety of reasons, it is the Committee's recommendation that its office and staff remain in operation and fully funded until the new Sentencing Commission begins its work.

Because of the education efforts the Committee must undertake before Truth-in-Sentencing becomes effective December 31, 1999, educational materials, including sentencing exercises, must be produced to teach the new law. Also, Microsoft Powerpoint presentations, in various lengths, should be produced for use at these seminars.

Many Committee members and staff have agreed to speak at many future education efforts. As of the date of this report, the dates, audience, and locations for these efforts include:

September 16-17, 1999 – State Public Defender Conference (state public defenders) in Milwaukee
September 27, 1999 – Wisconsin Correctional Conference (statewide corrections personnel) in Milwaukee
October 5, 1999 – State Judicial Districts 4 & 8 (court personnel) in Kimberly
October 14-15, 1999 -- Wisconsin Clerks of Court (court personnel) in Oshkosh
October 20, 1999 – DOC Management Team (same) in Appleton
October 22, 1999 – District 1 Felony Division Retreat (judges) in Milwaukee
November 5, 1999 – State Judicial District 7 (court personnel) in Spring Green
November 18, 1999 – State Bar Truth-in-Sentencing Continuing Legal Education seminar (general bar) in Brookfield

[317] A copy of this spreadsheet analysis is attached at Appendix K.

December 4, 1999 – Marquette University Law School Criminal Law Seminar (general bar) in Milwaukee
December 9, 1999 – Statewide Prosecutor Education and Training Seminar (state prosecutors) in Madison
December 16-17, 1999 – Judicial Truth-in-Sentencing seminar (statewide judiciary) in Wisconsin Rapids
January 26-28, 2000 – Bench-Bar Conference (statewide bar and judiciary) in Milwaukee

The Committee looked into federal technical assistance grants to help with the expenses of this educational effort. Unfortunately, this approach did not bear fruit.

The public information office of the Supreme Court of Wisconsin has grant money available for "mock trial" presentations and accompanying panel discussions for the media and the public around the state. That office has agreed to restructure these presentations to focus on Truth-in-Sentencing education, and the Subcommittee has made its members and Committee staff available to assist in that effort.

Another project to get underway will be the construction of a Criminal Penalties Study Committee website on DOA server space which will include a copy of the Committee's report, its minutes, and other key documents. Also, the State Bar of Wisconsin has committed to placing articles about Truth-in-Sentencing in its monthly magazine, The Wisconsin Lawyer, as well as in its quarterly section newsletters and on its website. Other education ideas include forming "training teams" involving a judge, an attorney, and maybe one Committee member, who would place local editorials, conduct interviews with the local media, and seek out community forums at which presentations on Truth-in-Sentencing will be given.

PART VIII

ISSUES THE COMMITTEE HAS IDENTIFIED FOR FURTHER STUDY

A. Probation as a Viable Alternative to Prison

Whether or not -- and if so how much -- Truth-in-Sentencing will exacerbate Wisconsin's prison overcrowding has been a concern during much of this Committee's study. The issue of prison overcrowding is intertwined with another topic of much discussion – lack of confidence in probation supervision, especially in Milwaukee.

1. The "Milwaukee Probation Problem"

Throughout this Committee's work it has received anecdotal comments by Milwaukee judges and witnesses knowledgeable about the criminal justice system in Milwaukee that probation supervision in Milwaukee is insufficient. This Committee is not the first to identify this problem.[318] After the Committee's study, it strongly concludes that an important element in reducing the increase in flow of prisoners into the prison system is to strengthen the effectiveness of probation and parole services in the Milwaukee area.

Violent and dangerous felons should be sentenced to prison and for periods long enough to protect the public. Further, some crimes so offend the public that prison should be considered, even though the felon may be considered not violent and not dangerous. But today in Wisconsin, felons are sometimes sentenced to prison who could be better sanctioned and the public adequately protected were the state to have more fully developed alternatives to prison than it now has. Exclusive of capital costs, it costs approximately $20,000 per year to house a felon in the prison system. It could cost only approximately $8,800 per year per felon to utilize an alternative to prison other than traditional probation, or even less, depending upon the level of supervision.

Although the legislature did not assign to this Committee the duty of studying either probation or alternatives to prison, our study has led us to the conclusion that Wisconsin must strengthen its probation system and develop credible alternatives to prison. The strength of probation supervision affects whether a judge will sentence an offender to prison or place that offender on probation. Also, the attractiveness of extended supervision may influence judges to use prison with extended supervision rather than probation in a case which is a close call between probation or prison.

[318] See Governor's Task Force on Sentencing and Corrections (December 17, 1996) pp. 1-2; "Privatizing Parole and Probation in Wisconsin," Wisconsin Policy Research Institute Report (April 1999) pp. 6, 10, 14-15.

Informal polls taken at this Committee's educational efforts yielded that approximately one-third of the Wisconsin judiciary lacks confidence in probation. The lack of confidence in probation is exceptionally strong in the Milwaukee judiciary. Approximately 40% of Wisconsin's prison inmates come from Milwaukee County. Yet Milwaukee has only 18% of Wisconsin's population. For the state as a whole in 1998, 67% of those convicted of a felony were placed on probation. The comparable figure for Milwaukee County was 52%.[319]

Some of these discrepancies can be attributed to causes other than lack of confidence in probation. Milwaukee County is the most densely urban area of the state and has greater social and racial problems than the less urban areas of the state. An armed robbery in Milwaukee County often is a much more serious armed robbery than one in a rural county. Milwaukee County's defendants tend to have more serious past criminal histories. And there is a higher conviction rate in Milwaukee County than other counties. For example, as to all burglary and auto theft charges in 1998, Milwaukee County had a conviction rate of 73%, while the comparable figure for the remainder of the state was 47%.[320] While a drive-by shooting may occur with some regularity in certain areas of Milwaukee, such a shooting is a rarity in much of the rest of the state.

There are many reasons for the lack of confidence in probation in Milwaukee. Milwaukee is the most urban area of the state with a heavy criminal case load with many probation agents and a large number of judges. Thus, communication between the judiciary and the agents is remote and impersonal, in contrast with the more rural areas where the judges and agents have frequent and close contact. Milwaukee has a higher turnover of agents. It has become a training ground with many newly trained agents leaving for more peaceful parts of the state. With a high turnover of agents, supervisors must spend more time training. In the past, there has been a lack of sufficient holding cells for short term incarceration of recalcitrant or uncooperative probationers and parolees. Agents have not had the tools such as immediate short-term incarceration to enforce discipline. Finally, the intensive sanctions program has fallen into disfavor for a variety of reasons.[321]

2. DCC's Attempts to Solve the "Milwaukee Probation Problem"

The DOC and its DCC are working hard to strengthen probation. As reported to this Committee at its July 9, 1999 meeting, DCC has strengthened its relationship with the Milwaukee Police Department. A DOC regional chief attends all police command staff meetings. DCC also has developed an absconder unit to actively search for people who violate their supervision and who do not report to their agents. Twenty probation agents are active seven days a week in that unit. The Milwaukee Police Department has designated six officers who work along with this absconder unit to find absconders. DCC

[319] See June 10, 1999 Study of 1998 Felony Conviction Data by Robert Brick of the Office of the Director of State Courts, p. 1 (on file with the Committee).
[320] See June 10, 1999 Study of 1998 Felony Conviction Data by Robert Brick of the Office of the Director of State Courts, p. 1 (on file with the Committee).
[321] See Intensive Sanctions Review Panel Final Report (Feb. 1998).

also has implemented a re-offender prevention enforcement ("ROPE") program, in which probation officers team with Milwaukee police officers to go out into neighborhoods in non-traditional working hours and on weekends to knock on doors to ensure that probationers or parolees are where they should be. These are unannounced visits; if a probationer or parolee is not there, or if contraband is found, the probationer is located and jailed. In Milwaukee, DCC has set up intake units in the Milwaukee County Courthouse and Safety Building so that immediately after offenders are placed on probation they have contact with a DOC representative, rather than waiting a long interval between sentencing and reporting to DCC. DCC is attempting to move away from "fortress probation" by developing neighborhood supervision. DCC works with the Milwaukee Police Department in neighborhood precinct offices.

Most importantly, more secure beds have been added in Milwaukee. DCC has arranged with the Milwaukee County Sheriff to add 125 beds, and has also provided 300 beds at the Racine Correctional Institution just for violators from Milwaukee County. A 400-bed addition has been constructed at the Milwaukee County House of Correction, and for the next 3 years 300 of those beds will be used to hold probation offenders accountable for their conduct. Further, in February 1999, the division broke ground for a 1,048 bed secure facility in Milwaukee, which will be run like a jail to hold probation and parole violators. Also, agents can now incarcerate offenders and place them in the county jail without their supervisor's approval for 10 days, a suggestion made by the Intensive Sanctions Review Panel. DCC has created community advisory boards across the state, including in Milwaukee, and the Milwaukee region has been assigned two regional chiefs to handle the magnitude of the caseload in that area.

3. Can the Racine and Dane County Experiments Help Solve the "Milwaukee Probation Problem"?

Stricter supervision has been tested in the Racine and County probation experiments. In these experiments, DCC has tried to develop a partnership with the community, to have strategies for local crime prevention, to supervise offenders actively, and to commit additional resources to enhance supervision. DCC has also evaluated these programs' successes and failures.

The enacting legislation for these experiments mandated that the programs take place in southern Wisconsin, so DCC chose Racine and Dane Counties. The legislature provided $7.6 million for 64 additional staff, 47 of whom are agents. The offices equally split $1.6 million for purchase of services. The agent-to-offender ratio is 1-to-17. In Dane County, neighborhood supervision has been developed in which housing for the probationers has been located in the probationer's neighborhood and community police stations have been set up. In Racine County, DCC has located its facility in the same houses as community police stations and community-oriented policing houses.

After one year, the International Committee of Corrections Association independently reviewed the experiments. The Dane and Racine County projects scored

tops in the country on the inventory used to ascertain the effectiveness of correction treatment programs.

The experiments have produced close positive working relationships with local law enforcement. Day-reporting centers have been developed. The experiments have demonstrated that offenders need to be programmed for at least 70% of their day. In addition to work, they need to be involved in other treatment, parenting programs, and/or cognitive skills programming. The staff believes their caseloads are manageable, and resources are available to purchase services the supervisees require. Technology is also being used. Geographical information systems in Racine and Dane Counties are used to plot where offenders are located. Both programs have community advisory boards.

It is the Committee's recommendation that the positive results of the Dane and Racine County experiments be applied in Milwaukee to help solve its probation difficulties.

4. Alternatives to Incarceration

Two Truth-in-Sentencing states that have managed to reduce the number of inmates in prison while continuing to imprison violent and dangerous offenders for longer periods of time inmates are North Carolina and Virginia. Study of other states, especially North Carolina, show that in these states' implementation of Truth-in-Sentencing, in addition to increasing the number of prison beds, they greatly increased state funding for alternatives to incarceration and for probation/parole supervision. These states have accomplished this in good part by using intermediate sanctions as an alternative to prison. Their intermediate sanctions involve highly structured treatment facilities, short-term lockup, and immediate punishment for infractions and strict supervision, all done under the ambit of community corrections. The cost per inmate per year is higher than ordinary probation, but less than prison. It has meant more money from the legislature for more agents and treatment, but that investment of resources has resulted in a reduction of the overall cost of the system. The same could be done in Wisconsin to keep the lid on prison costs.

According to recently-released U.S. Department of Justice statistics, in 1998 Wisconsin experienced the third-largest percentage increase in its prison population among the 50 states. These statistics state that Wisconsin's prison population increased from 16,277 in 1997 to 18,451 inmates in 1998 – a 13.4% increase. This translates into an increase from 283 to 334 sentenced inmates per 100,000 residents. Wisconsin has also placed more inmates in other states' or federal facilities than any other state in the country: 3,028 as of year-end 1998.[322]

This Committee studied in detail the implementation of Truth-in-Sentencing in four states. Three of those four states rank among ten lowest one-year growth rates in prison population. From 1997 to 1998, Ohio's prison population increased only .9%, Virginia's increased .6%, and North Carolina's .6% as well.[323] The lessons learned in

[322] See U.S. Dep't of Justice, Bureau of Justice Statistics, NCJ 175687, pp. 3 & 5.
[323] See U.S. Dep't of Justice, Bureau of Justice Statistics, NCJ 175687, p. 5.

those states, especially the implementation of alternatives to incarceration for deserving offenders, can help Wisconsin stem its tide of prison population growth

Drug offenses continue to be a significant factor in the increasing prison population. Milwaukee County, which has 18% of the state's population, is responsible for more than one-half of the drug offense admissions to prison. Many of these offenders are small-time drug dealers who serve between six months to two years of actual time in prison. Because under Truth-in-Sentencing the minimum prison sentence is one year, if the same number of drug offenders are continued to be sentenced to prison there could be a significant increase in inmates over time.

There was much debate at Committee meetings as to the percentage of offenders convicted for drug crimes who are themselves addicted to drugs. The Milwaukee County District Attorney's office's drug unit believes the percentage to be approximately 25%, while Corrections and the Public Defender believes it to be 67% or higher. Whatever the actual percentage, drug users should be screened out for treatment in highly controlled and structured facilities outside prison which can be operated at a lower cost per inmate per year than within the prison system.

The Committee recommends that DOC be given sufficient resources to permit the use of strict supervision and appropriate drug and alcohol treatment facilities in Milwaukee County and other urban areas with high crime rates. The Committee further recommends that Wisconsin study successful crime reduction programs in other states such as the CUNY Catch Program in New York, the drug prison in Pennsylvania, and the drug usage program in Arizona, with the view of possibly implementing them in Wisconsin.

Under current conditions, Truth-in-Sentencing could exacerbate the prison overcrowding problem, at increased cost to the state, because the judiciary could view extended supervision as a more attractive alternative than probation. Under Act 283, a sentencing judge can set conditions to be met while on extended supervision. A judge cannot now set conditions of parole. To take advantage of the judicial control and supervision permitted under extended supervision, a felon must first be sentenced to prison for at least one year. Because Wisconsin will no longer have parole, an offender sentenced to prison will serve his or her entire prison sentence. Thus, a 1-year sentence under the new system is equivalent to a 2½-year sentence under the old system. Since non-violent and non-dangerous felons generally have received shorter sentences under the old system, the greatest danger of sentence inflation and hence prison overcrowding and expense lies with those felons whose crimes call for these shorter sentences.

This discussion of probation cannot end without some reference to the minority racial overrepresentation within the corrections system. Approximately 58% of the prison population[324] and 36% of the probation/parolee population are members of minority groups. Yet minorities make up only 10% of the state's population. Over 3% of the state's black

[324] For purposes of comparison, 1998 U.S. Department of Justice statistics indicate that nationwide members of minority groups make up approximately 52% of prisoners under state or federal jurisdiction. See U.S. Dep't of Justice, Bureau of Justice Statistics, NCJ 175687, p. 9.

population was in prison as of December 31, 1998, along with 1% of the Native American population and 1% of the Hispanic population. The comparable figure for whites was .17% Only Asians had a lower percentage at .12%.[325] Although it is not within this Committee's statutory charges to explain these figures, they do deserve attention and further study.

The Committee discussed this race issue at length, and strongly recommends that the Sentencing Commission formally study the minority racial overrepresentation within Wisconsin's criminal justice system.

B. DOC Data Problems

As described above in part VI, this Committee struggled mightily to get accurate data to use in its study and in meeting its statutory charges. It succeeded only partially. When CCAP, or OPUS for DOC, are fully operational, they may be capable of some of the forecasting necessary to engage in this public policy discussion. But policy- and decisionmakers need to understand how woefully inadequate Wisconsin's criminal justice information and corrections computer systems are for fundamental public policy debate.

Because of the difficulties the Committee faced in securing accurate data,[326] it strongly recommends that the Sentencing Commission make one of its first priorities studying and fixing the manner in which Wisconsin retains its corrections and court system data.

This Committee's computer model is state property. The Committee encourages the new Sentencing Commission, the DOC, and other state entities to use, revise, and build onto the computer model so that it may continue to help policy debate in this area.

C. Cost of Committee's Proposals

A fiscal note will be attached to the proposed legislation estimating fiscal impact of Committee's proposed legislation. Corrections populations and cost projections are listed above at pp. 142-144.

Throughout the Committee's work, members discussed the role cost should play in the Committee's discussions and its conclusions. Concerns about the increasing corrections budget are not unfounded due to the ever-increasing portion of state spending devoted to this issue. Some members worried that if judges did not adjust new determinate sentences downward to at least approximate current time to first release, two negatives would occur:

> (a) "new world" offenders will quickly clog the system, forcing dangerous "old world"-parolable offenders out of the system, many of whom would go to Milwaukee; and

[325] See Appendix M.
[326] See pp. 135-136.

(b) Truth-in-Sentencing sentences will result in so many additions to prisons, or new prisons having to be built, that the corrections budget will become unmanageable.

Given its study and "overview" capability, the Committee offers 3 major ways costs can be controlled:

(a) education, especially of judge and prosecutors, to whom much discretion has been shifted under Truth-in-Sentencing;

(b) alternatives to prison – so a judge need not always use a $20,000 per year per offender solution; this includes the strengthening of probation; and

(c) sentencing guidelines – to funnel "typical" cases into proper sentencing ranges.

Also, it must be remembered that cost savings from incarcerating an offender must be calculated. This is not as easy to calculate, but such externalities are part of an entire cost picture.

D. Revision of the Criminal Code

The Code Reclassification Subcommittee had the responsibility to examine each felony and Class A misdemeanor codified in the Wisconsin Criminal Code[327] for the purpose of classifying these crimes in a uniform crime classification system.

During its inspection of the Code, the subcommittee identified numerous problems with its provisions which it respectfully calls to the attention of the legislature. The Code contains overlapping statutes,[328] inconsistent statutes,[329] outdated statutes,[330] statutes so long and complex that they defy usage (though they address important problems),[331] statutes dealing with civil liability and procedures for enforcing civil

[327] The Criminal Code consists of chapters 939 to 951 of the Wisconsin Statutes. See Wis. Stat. sec. 939.01. It does not include the Uniform Controlled Substances Act (Wis. Stat. ch. 961).
[328] See, e.g., Wis. Stat secs. 943.32(2) (armed robbery) and 943.23(1g) (carjacking).

[329] A good example of inconsistent statutes may be found in Wisconsin's abortion laws. The Criminal Code contains both a pre-Roe v. Wade statute (Wis. Stat. sec. 940.04) and a post-Roe v. Wade statute (Wis. Stat. sec. 940.15). The former was not repealed when the latter was enacted.
[330] See, e.g., Wis. Stat. sec. 941.34, which prohibits use or possession with intent to use a flouroscopic shoe-fitting machine. See also Wis. Stat. sec. 943.20(3)(d)4, which codifies an aggravated form of theft when the property which is stolen had been removed from a building because of the "proximity of battle." Vagrancy by having the physical ability to work but not actually working or seeking work is another example. Wis. Stat. sec. 947.02(1).
[331] See, e.g, Wis. Stat. secs. 940.285 (Abuse of Vulnerable Adults) and 940.295 (Abuse and Neglect of Patients and Residents).

claims,[332] and statutes offering protection against the lowest form of battery to an endless list of groups and punishing those batteries at the felony level.[333] The subcommittee also found a dizzying set of options and requirements in the area of punishment for crime. Examples include minimum mandatory penalties, presumptive minimum penalties, penalty doublers, mandatory consecutive sentences, etc.

To these problems may be added the exponential growth in the number of crimes and penalty enhancement statutes in the Code, a diminishing role for culpability (mental state) in defining crime and assessing offense severity, little guidance to prosecutors on how to make charging decisions when the defendant's conduct violates multiple similar statutes, and few limits on the number of convictions that may be obtained in those circumstances. The latter two problems invite substantially dissimilar responses to similar criminal conduct from county to county throughout the state.

This is not the first time Wisconsin's criminal laws have been so desperately in need of recodification. The problems described above are the very same kinds of problems that impelled this state's last recodification effort.[334] But that task was undertaken nearly 50 years ago. In the meantime, with a few notable exceptions,[335] additions to the Code have been made on an *ad hoc* basis as the legislature has grappled with new ways of doing old bad things, with new bad things, and with conflicting approaches to punishing both.

The recommendations made by the Committee in this report attempt to deal with some of these problems, to the extent that the Committee could do so within the limits of its charges or without straying too far from them. Devising a uniform system for classifying all crimes, expanding the number of felony classes to afford greater stratification of crimes according to harm and mental state, recasting many of the penalty enhancers as aggravating factors to be considered at sentencing, simplifying the general battery statutes, and removing some of the impediments to the exercise of sound judicial discretion at sentencing are important improvements which may lay some of the groundwork for an overhaul of the Criminal Code. They are not, however, a substitute for recodification.

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[332] See, e.g., Wis. Stat. secs. 943.235 (Worthless Checks; Civil Liability) 943.51 (Retail Theft; Civil Liability).

[333] See Wis. Stat. secs. 940.20 to 940.207. A similar set of special circumstances crimes exist in the criminal damage to property context. See Wis. Stat. secs. 943.01(2) to 943.015.

[334] See 1955 Wis. Laws 656.

[335] The notable exceptions are the revision of the sexual assault laws in 1975 (1975 Wis. Laws 184), the penalty classification bill enacted in 1977 (1977 Wis. Laws 173), and the revisions to the homicide laws and the laws dealing with crimes against children enacted in the late 1980's (1987 Wis. Act 399 and 1987 Wis. Act 332, respectively).

E. The Challenge of Drugs

The Code Reclassification Subcommittee also had responsibility for classifying crimes codified in the Uniform Controlled Substances Act[336] and determining how that Act's enormously complex set of penalty provisions could be brought within a uniform system of crime classification. This the subcommittee has done and its recommendations, which are detailed earlier in this report, have been adopted by the full Committee.

During the course of its study of the drug laws, the subcommittee heard much about the inability of the criminal law to "solve" the drug problem by itself, the enormous consumption of prison resources by those convicted of drug offenses, the inadequacy of treatment programs for those who are both convicted and addicted, and the insufficiency of innovative responses to the drug problem, like the drug treatment courts used in other jurisdictions. It also learned about the lack of confidence judges and prosecutors have in alternatives to prison incarceration in drug cases, most especially in Milwaukee County.

While the Committee did not conduct its own independent study of these issues, it learned enough to conclude that a comprehensive review of the state's drug policies as they relate to education, prevention, treatment, enforcement, punishment, etc. should be undertaken. Therefore, it recommends the same to the legislature. In suggesting this study, the Committee wishes to make it explicitly clear that it is not recommending the legalization of controlled substances.

[336] Wis. Stat. ch. 961.

CONCLUSION

For all of the reasons articulated in this report, the Committee respectfully commends its proposals to the legislature, the governor, and the citizens of the State of Wisconsin.

Dated at Madison, Wisconsin this 31st day of August, 1999.

Respectfully submitted,

CRIMINAL PENALTIES
STUDY COMMITTEE